

THE PRESS COUNCIL
An Experiment in Guarding
Free Speech

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Research Guide

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PREFACE

I started the final writing of this thesis, perhaps as a coincidence, on May 3, the day proclaimed by the UNESCO as World Press Freedom Day. The observance of the day was mostly confined to a concise announcement in an insignificant inside corner in some newspapers; others just ignored it. The theme, if not the day, however, deserves a more serious attention at a time when the country is more dissatisfied than ever with its own media.

The exercise brings to mind a 17th century English pamphleteer named John Twyn who published a defence of the revolution. Condemned for treason, he was hanged, cut down while still alive, emasculated, disemboweled, quartered and, presumably to make absolutely sure, beheaded. A great many people today feel that this is just about the treatment appropriate to their journalists. Elsewhere in the world, they are in fact treated almost that way. In 1995, according to the New York-based Committee to Protect Journalists, 51 reporters

and editors were killed in the line of duty. Although it was less than the previous year's 73, 1995, according to CPJ chairperson Kati Marton, marked a growth in the trend of journalists being deliberately targeted for assassination.

Many of the world's governments have enshrined press freedom in their constitutions but feel free to ignore it. The Universal Declaration of 1948 proclaims freedom of expression as an essential human right. But government resistance to it is tenacious. For the most part, the fight against press freedom comes down to politicians protecting themselves and the status quo. The media, they claim, exercise power without responsibility.

After the collapse of the Soviet Union, democracy seemed to be on the march everywhere, together with an independent press. For security and prosperity, the spread of democracy is essential. And democracy is impossible without a free press. Free and responsible, of course. But responsibility is not likely to be taught by

the Twyn treatment or lesser forms of repression.

1. Reasons for the choice of this theme

The Indian press, befitting to the glorious as well as suicidal fight put up by its originator, Augustus Hicky, against the repression of Warren Hastings, is still in the throes of a struggle to carve out a niche for itself in the lively political arena of the country. Threats galore and accusations of the press becoming irresponsible are not stray. Its culmination was the muzzling of the press during emergency. The danger perpetuated by smaller minions persists.

There is no doubt that the press should be responsible. At the same time any external regulation, be in the form of pre-censorship or otherwise, is anathema because of the importation of the Blackstonian concept of press freedom to our Constitution in the light of the U.S. Supreme Court decisions. It was in this context that the Press Council was established in 1968, on the

recommendation of the Press Commission, as a statutory body, to regulate the press from within and to safeguard its freedom. The chequered career of the Council, with a two-year interregnum during emergency, is a novel and unique experiment worth studying. Though the institution of the press council has now become a universal phenomenon, the Indian experience is receiving encomium from other Councils for its effective and trend-setting method of functioning as adjudicator, arbitrator and legislative consultee.

A significant factor which prompted me to choose this theme is the insignificant knowledge or familiarity evinced by the journalists themselves in the functioning of the Press Council as a friend, philosopher and guide of the press. The available literature on the subject is also scanty. Books on press laws are, no doubt, useful for lawyers to track down statutory provisions and judicial precedents; but not much useful to serious students of law and journalism exploring the core area of legal doctrine.

2. Previous studies on this topic

A useful study on the institution of Press Council first came from H Phillip Levy whose pioneering work THE PRESS COUNCIL: History, Procedure and Cases, with a preface by Lord Devlin, then Chairman of the British Press Council, was published in 1967. A review of the book was published by Geoffrey Robertson in 1983 under the title PEOPLE AGAINST THE PRESS: An Enquiry into the Press Council. The first Indian study on the subject was done by N K Trikha, a former member of the Press Council, in 1986, almost two decades after the coming into existence of the Council. Trikha's book THE PRESS COUNCIL: A self-regulatory mechanism for the press contains inside knowledge of the working of the Council with an informed critical analysis. Apart from this, the only available material is a series of monographs published by the Indian Law Institute in collaboration with the Press Council. They are Violation of Freedom of the Press (1986), Law of Defamation: Some Aspects (1986), Violation of Journalistic Ethics and Public Taste (1984),

Parliamentary Privileges and the Press (1984), Contempt of Court and the Press (1982) and Official Secrecy and the Press (1982). Rajeev Dhavan's ONLY THE GOOD NEWS (1987) and P. M. Bakshi's PRESS LAW (1986) are valuable additions to the meagre literature on the subject. The quarterly review and the annual report of the Press Council are an enriched source material for our study apart from the occasional newspaper articles and commentaries made by vigilant champions of the freedom of the press like Soli Sorabjee and A. G. Noorani. The umpteen number of decisions so masterfully rendered by our Supreme Court on the basis of the English and American decisions provide the bedrock to sustain the arguments which, I have to confess, tend to be partisan at times with a natural and pardonable tilt in favour of the press.

3. Outline, Method and Importance

This work is divided into five sections, with thematically developed chapters for each section. The

first section gives an insight into the process of developing the concept of press freedom and how it was incorporated into our legal philosophy and terminology with a particular meaning and content. The history of the Press Council as a self-regulatory mechanism is narrated in chapter 2. With a world overview, we are coming to the Indian Press Council, its origin, development and composition. The working of the Council is narrated in greater detail with an analysis of the issues like desirability of conferring penal powers on the Council and the desirability of framing a code of conduct for newspapers, news agencies and newsmen.

The second part is devoted to the opinion rendered by the Council in its advisory as well as adjudicatory jurisdiction. The areas of conflict bedeviling the press are identified in self-contained chapters. Those are again divided into categories like press and legislature, press and judiciary, press and executive, press and society, press and individual. Basic problems like right of reply, right to information, protection of the news

source, role of the editor and the threats and possibilities posed by the proposed entry of foreign newspapers are treated in great detail, marshalling out all available material within the pre-fixed parameters of this thesis.

The third part is a case-book. It is only a collection of sort with the intention of giving an insight into the way in which the Council is likely to approach the decision of cases on the subject. These representative cases have been culled out from the annual reports of the Council and have been stated briefly underlining the principles underlying the decisions and observations of the Council.

Part Four will be a critical evaluation of the functioning of the Council. We will examine the positive as well as negative aspects and try to make some practical suggestions for a true and effective functioning of the Council as a self-regulatory mechanism for the press.

Part Five contains recommendations of the Council on important laws affecting the press, its guidelines on various issues, code of conduct suggested by professional bodies and important statutory provisions.

As is clear from the division of the work and its contents, the method that is being followed is expository, analytical and historical. In brief, the whole study will be expository in nature, but being treated from a juridical point of view.

We intend to make the whole study on three working hypotheses: that freedom of the press is absolutely essential for the success of a democracy; that the press should be free and at the same time responsible; and that the only permissible method of controlling the press is the enforcement of self-control. We firmly believe that it is not just the proof of these working principles that is important, but that a conviction about their importance is significant for our freedom and democracy.

This study analyses the role of the Press Council as a champion and guard of free speech. It discusses the extent to which the Council succeeded in achieving its statutory objective of preserving the freedom of the press and maintaining and improving the standards of newspapers and news agencies. It also examines the inherent and in-built weaknesses of the Council and suggests ways and means for restructuring and enlarging its functions.

I wish to express my gratitude to Dr V D Sebastian for the invaluable advice he gave me throughout the preparation of this thesis apart from suggesting the subject itself. I am also greatly indebted to Professor K N Chandrasekharan Pillai, Dean of the Faculty and Head of the School of Legal Studies, Cochin University, for all the affectionate as well as authoritative persuasion which prompted me to complete this work at least at the end of the prescribed period.

S.F.

Part One

HISTORY, CONSTITUTION
AND PROCEDURE

CHAPTER 1

FREEDOM FROM PRIOR RESTRAINT

If I had to choose between having a government without newspapers on the one hand and newspapers without a government on the other hand, I would have no hesitation in preferring the latter.

Thomas Jefferson

I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press.

Jawaharlal Nehru

1.1 Newspapers of a sort have existed since the Chinese T'ang dynasty - about a 1,000 years ago. Handwritten sheets circulated information around the imperial court. Similarly in Europe, handwritten news sheets were the only means, apart from word of mouth, of passing on details of current events. The earliest known European news sheet is Norwegian, dated 1326.

1.2 When printing - developed in Germany about 1450 - was applied to news sheets, more could be circulated at a lower cost. One printed in Rome in 1493 described

Columbus's recent voyage to the New World. News sheets were printed only when there was a newsworthy event to be reported.

1.3 The first weekly paper was possibly *Aviso Relation Zeitung*, published in Wolfenbuttel, Germany, by Adolph von Sohne in Europe.¹

1.4 In the 19th century, the political influence of newspapers earned British journalists the tag 'the fourth estate,' recognising the power they shared with the traditional three estates of the nation - church, nobility and common people.²

1.5 The first English newspaper was started in London in 1621 by Nathaniel Butter. His paper - which never had a fixed title - appeared more or less weekly. Even in that rudimentary stage, the press was not considered as a neutral vehicle for the balanced

¹. The Inventions That Changed The World: The Reader's Digest Association Limited (London, 1982) at 187.

². What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

Burke said there were Three Estates in parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact - very momentous to us in these times.

discussion of diverse ideas. Instead, the free press meant organised, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared: the press was licensed, censored and bedeviled by prosecutions for seditious libel.

THE DANGER OF PRIOR RESTRAINT

1.6 The British had an effective licensing system beginning in 1530 under Henry VIII. It is in protest against such governmental interference that the concept of freedom of the (printing) press³ developed in England. That campaign had its crowning glory when Milton wrote Areopagitica in 1644 as a protest addressed to the Long Parliament. It was a time when printing was seen by those at the head of Church and State in Europe as a potential threat to their authority. Many printers faced considerable risks. In the 16th century the Inquisition set itself up in Italy as a censor of books. In England though the notorious Star Chamber was abolished by the Long Parliament in 1641, the licensing system continued. Milton stirred the conscience of the society by exhorting

³. William Caxton, England's first printer, started work in Westminster in 1476.

that free men must have the 'liberty to know, to utter, and to argue freely according to conscience, above all liberties'.⁴ However, the system remained in effect, one way or another, until 1695 when the licesing law expired, and the House of Commons refused to pass a new one. Though the reasons given were technical,⁵ the system was killed for practical reasons. Both Torys and Whigs feared that the other party might use such a system to stifle the opposition press, a medium through which both parties at various times had gained considerable support. Hence, the reluctance of members of Parliament to support licensing. Since then there was no further attempt to introduce any previous restraint on the publication of printed matter and by 1784 it was acknowledged in the courts that-

The liberty of the press consists in printing without any previous license, subject to the consequences of law.⁶

⁴. J. Milton, Areopagitica, in J. Patrick, ed., The Prose of John Milton 327 (New York: New York University Press, 1968).

⁵. Vide Macaulay, History of England (1872), Vol IV, p. 78.

⁶. R. v. Dean of Asaph, (1784) 3 T.R. 428.

1.7 The reason why 'prior restraint' was obnoxious but not subsequent punishment, was explained by Blackstone thus:

Any form of prior restraint is a fetter on the free will of the people and an attempt to control the liberty of expression by administrative authorities. A subsequent punishment does not put any restraint on the freedom of thought or expression; it only takes account of the abuse of the freedom by punishing anybody who publishes anything which has been made illegal by the law, as injurious to the society. By punishing licentious, subsequent punishment, thus, maintains the liberty of the press.⁷

1.8 Freedom of the press in England is thus the freedom of the press from prior restraint or pre-censorship.

1.9 The struggle for freedom of the press had its greatest triumph when it came to be guaranteed by a written constitution, as a fundamental right. In 1776, the Virginia Bill of Rights asserted:

⁷. (1765) 4 Bl. 151 (152); See also Halsbury (4th Ed.) Vol. 18, para 1694.

Freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

1.10 This was followed by the federal Bill of Rights, incorporated into the U S Constitution by the First Amendment in 1791:

Congress shall make no law ... abridging the freedom ... of the press.

1.11 In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. As Justice Brandeis once wrote:⁹

The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

1.12 The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

⁹. Patterson v. Colorado, (1906) 205 U.S. 454 (462).

The liberty of the press is essential to the security of the state.

1.13 From the Blackstonian concept of absence of previous restraint, imported along with the common law from England, the free press guarantee has acquired a larger and positive content which was summarised by Justice Black in these words:⁹

No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression ... than the people of Great Britain had ever enjoyed ... the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society.

1.14 This broader aspect of the freedom of the press today has been formulated judicially¹⁰ in these words:

... the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might

⁹. *Bridges v. California*, (1941) 314 U.S. 252 (265).

¹⁰. *Bigelow v. Virginia*, (1975) 44 L.Ed. 2d 600; *Curtis Pub. Co. v. Butts*, (1967) 388 U.S. 130 (150).

prevent such free and general discussion of public matters as seems absolutely essential.

1.15 As Cooley pointed out, mere absence of previous restraints was not enough. Subsequent punishment might also be odious, unless it is subject to constitutional limitations.

... liberty of the press might be rendered a mockery and a delusion ... if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.¹¹

AMERICAN VIEW

1.16 Since the United States imported the common law from England, most historians and legal scholars agree that the fathers of the Bill of Rights understood the concept of freedom of the press in the Blackstonian sense of absence of prior restraint.¹² Some persons, such as Hugo Black and Zachariah Chafee, have argued that it precludes a good deal more.¹³ Even revisionist historian

¹¹. Cooley, *Constitutional Limitations*, II, xii, 883.

¹². *Patterson v. Colorado* (1906) 205 U.S. 454 (462).

¹³. See Zachariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1941). In a famous case in 1732, involving an attempt by a royal official in New York to silence criticism of him by a hostile editor, a plea was made that while in England, such criticism would, indeed, be

Leonard Levy agrees that the phrase freedom of the press in the First Amendment was "an assurance that the Congress was powerless to authorize restraints in advance of publication."¹⁴

1.17 The American courts had little opportunity to explore the problem of prior restraint as the 140 years since the Constitution were free from instances of direct pre-publication censorship. Then came Near v. Minnesota,¹⁵ one of the most important cases of the century. In that case the Supreme Court struck down a Minnesota "gag law" which was used to enjoin H M Near from publishing the Saturday Press unless he could convince the state authorities that his paper would no longer be a "public nuisance". This dramatic example of prior restraint was condemned by Chief Justice Charles Evans Hughes who declared that the chief purpose of the liberty of the press was to prevent previous restraints upon publication.

punishable, "America must have her own laws". See, Paul L. Murphy, "Certain Unalienable Rights," Issues and Themes (1975).

¹⁴. See Leonard W. Levy, "Liberty and the First Amendment: 1790-1800" in Origins of American Political Thought 257 (John P. Roche, ed. 1967).

¹⁵. 283 U.S. 697 (1931).

1.18 The 1931 Near case, a great hallmark of press freedom, ruled the roost for the next 40 years till another celebrated case arose in 1971 now known as the *Pentagon Papers* case.¹⁶ It was a case in which the U S Supreme Court refused to prohibit the *New York Times* and the *Washington Post* from publishing a series of articles based on classified Pentagon documents on U S involvement in Vietnam. The court held by majority that (1) any prior restraint on a newspaper bears a heavy presumption against it being unconstitutional; and (2) the government must meet a heavy burden of showing justification for such restraint. Later in *Tornillo*¹⁷ it was fairly established that no governmental agency could dictate to a newspaper in advance what it could print and what it could not. Two years later in 1976 the court, after reviewing prior restraint cases (primarily *Near v. Minnesota* and *New York Times v. United States*), again stressed:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.¹⁸

¹⁶. *New York Times v. U.S.*, 403 U.S. 713 (1971).

¹⁷. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

¹⁸. *Nebraska Press Association v. Stuart*, 427 U.S. 539.

1.19 In its lead editorial on 1 July 1971, the day after the Supreme Court of the United States had "freed" the Pentagon Papers, the New York Times exulted:

The historic decision of the Supreme Court in the case of the United States Government v. The New York Times and the Washington Post is a ringing victory for freedom under law ... the nation's highest tribunal strongly reaffirmed the guarantee of the people's right to know, implicit in the First Amendment to the Constitution of the United States.

INDIA, PRIOR TO INDEPENDENCE

1.20 Since there were no fundamental rights in India prior to Independence, there was no guarantee of the freedom of expression or of the press. The footing of the press was explained by the Privy Council¹⁹ to be the same as in England, namely, that of an ordinary citizen so that it had no privileges nor any special liabilities, apart from statute law.

1.21 However, the history of Indian journalism tells a different story.

¹⁹. Arnold v. Emp., A.I.R. 1914 F.C. 116.

1.22 The first-ever full-fledged newspaper to make an appearance in the country, the Bengal Gazette, also known as the Calcutta General Advertiser and Hicky's Gazette, was launched in Calcutta on 29 January 1780. Highlighting most of the time the vices of the Governor General, Mr Warren Hastings, and his consort, the Gazette, edited and published by the pioneer of journalism in India, Mr James Augustus Hickey, attracted the unbridled wrath of the East India Company and was forced to fold up in 1782 after 26 months of chequered publication.

1.23 The Licensing Act was dead in England in 1694 and by 1784 it was acknowledged in the courts that "the liberty of the press consists in printing without any previous licence, subject to the consequences of law".²⁰ However, it is a curious riddle that the East India Company, even after it was brought under the direct control of the British Parliament with the passing of the Regulating Act of 1773, was experimenting with the very same obnoxious methods to muzzle the toddling press in India. When Hicky's Gazette was folding up, the editor was in jail and the press was under seizure. Most of the

²⁰. See the case cited supra note 4.

time Mr Hicky was editing the paper from jail: he was in jail for 16 months though the paper was in existence only for 26 months.

1.24 The first press law in India was the Regulations issued by the Governor General in 1799 which required the submission of all material for pre-censorship by the Secretary to the Government of India. Though pre-censorship was later abolished, an ordinance was promulgated in 1823 introducing 'licensing' of the press under which all matters printed in a press, except commercial matters, required a previous license from the Governor General. The licensing regulations, though replaced by Metcalf's Act in 1835, were reintroduced by Lord Canning's Act of 1857 and it was applied to all kinds of publication, including books and other printed papers in any language, European or Indian.

1.25 The year 1878 saw the passing of the Vernacular Press Act which was specifically directed against newspapers published in Indian languages, for punishing and suppressing seditious writings. It empowered the government, for the first time, to issue search warrants and to enter the premises of any press, even without

orders from any court. Fortunately, it was short-lived, being repealed in 1881.²¹

1.26 The Newspapers (Incitement to Offences) Act, passed in 1908, empowered a magistrate to seize a press on being satisfied that a newspaper printed therein contained incitement to murder or any other act of violence or an offence under the Explosive Substances Act. That Act was followed by a more comprehensive enactment, the Indian Press Act, 1910, directed against offences involving violence as well as sedition. It empowered the government to require deposit of security by the keeper of any press which contained matter inciting sedition, murder or any offence under the Explosive Substances Act, and also provided for forfeiture of such deposit in specified contingencies. The rigours of this Act were enhanced by the Criminal Law Amendment Act of 1913 and by the Defence of India Regulations which were promulgated on the outbreak of the First World War in 1914.

²¹. Sisir Kumar Ghosh, the diehard nationalist and founder of Amrita Bazar Patrika, turned his Bengali newspaper into an English daily overnight for evading this restrictive law. The 1878 Act is now best remembered in the annals of this tremendously influential newspaper conglomerate.

1.27 Both the Acts of 1908 and 1910 were repealed in 1922 in pursuance of the recommendations of a committee set up in 1921 to the effect that the contingency in view of which these Acts had been passed was over and that the purposes of these Acts would be served by the ordinary law.

1.28 This benevolence was ephemeral. Infuriated by the launching of the civil disobedience movement in 1931 for the attainment of swaraj, the Government promulgated an ordinance²² to 'control the press' which was later embodied in the Press (Emergency) Power Act, 1931. Originally a temporary Act, it was made permanent in 1935.

1.29 The 1931 Act imposed on the press an obligation to furnish security at the call of the executive. The provincial governments were empowered to direct a printing press to deposit a security which was liable to be forfeited if the press published any matter by which any of the mischievous acts enumerated in section 4 of the Act were furthered, e.g., bringing the government into hatred or contempt or inciting disaffection towards the government; inciting feelings of hatred and enmity between different classes of subjects, including a public servant to resign or neglect his duty. This system of

executive control and punishment of the press was foreign to democratic England. As pointed out by Durga Das Basu,²² it was an antiquated revival of the trial by Star Chamber of press offences and the licensing system which English democracy had fought and suppressed. The very preamble of the Act - "for the better control of the press" - was offensive.²³

AFTER INDEPENDENCE

1.30 This in company with the Official Secrets Act and various provisions of the Indian Penal Code and the Criminal Procedure Code provided the queer scenario of press repression in India at the time of Independence which prompted our Constitution-makers to depart from the British pattern and draw inspiration from the 160 years of American experience in the development of press freedom. It is only in consonance with this that from the very beginning, the Indian Supreme Court came to be influenced by American decisions in interpreting Article

²². Basu, Law of the Press (Prentice-Hall of India Private Limited, New Delhi, 1986), p. 257.

²³. Some of the clauses of the Act were declared to be repugnant to the provisions of Art 19(2) of the Constitution, as it then stood. Cf. Amarnath v. State, A.I.R. 1951 Punj. 18; Srinivasa v. State of Madras, A.I.R. 1951 Mad. 70; Rama Shankar v. State, (1954) Cr L.J. 1212. The Press Laws Enquiry Committee also recommended repeal of the Act.

19(1)(a) even though while interpreting other provisions of the Constitution, the court expressed reluctance in importing American case-law.²⁴ The Supreme Court, in the very first case²⁵ that came up for consideration under Article 19 (1)(a), acknowledged the influence of the U S First Amendment in the incorporation of the right to freedom of speech and expression in our Constitution:

Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with James Madison, who was the leading spirit in the preparation of the First Amendment of the Federal U.S.

²⁴. See K K Venugopal, "Guarding Free Speech, Precedents and Procedures," Span (May 1987), p. 11.

²⁵. Romesh Thappar v. State of Madras, A.I.R. 1950 S.C. 124.

Constitution,' that 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'. - Quoted in *Near v. Minnesota* (283 U.S. 607).

1.31 In the result, the positive trend of American decisions has been followed by our Supreme Court without any inconsistency. The court not only accepted freedom of the press as an integral part of the freedom of speech but gave it the status of a basic pillar of the democratic structure on which the Constitution was built. In Brij Bhushan v. State of Delhi,²⁶ the court held that the freedom of the press was one of the most valuable rights guaranteed to a citizen by the Constitution. In culmination of this trend, Bennett Coleman & Co. v. Union of India²⁷ referred to the freedom of the press as "the Ark of the Covenant of the Constitution". Again in Maneka Gandhi v. Union of India,²⁸ Justice P N Bhagwati set out the basis for giving this right the "preferred position" which the U S Supreme Court had conferred on the freedom of speech and press:

²⁶. A.I.R. 1950 S.C. 106.

²⁷. A.I.R. 1973 S.C.106.

²⁸. A.I.R. 1978 S.C. 597.

Democracy is based essentially on free debate and open discussion, for that is the only corrective of governmental action in a democratic set-up. If democracy means government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right to making a choice, free and general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers - do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler? The newspapers are an index of the true character of the government, whether it is democratic or authoritarian. It was Mr Justice Potter Stewart [of the U S Supreme Court] who said: "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy...

1.32 In the Nakkheeran case²⁹, while upholding the right of the magazine to publish the autobiography of a condemned prisoner, the Supreme Court categorically proclaimed that any attempt on the part of the State or its officials to prevent the publication of a matter in a newspaper would amount to prior restraint which is a constitutional anathema. At the same time the court felt that the principles emerging from the English and American decisions need some modifications in their application to our legal system because the sweep of the First Amendment to the U.S. Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises.

1.33 There has been similar thinking throughout the democratic world. The Universal Declaration of Human Rights, proclaimed by the United Nations in 1948, has enshrined in Article 19 the right to a free press. It reads:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

²⁹. R Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264.

THE PROBLEM OF ACCOUNTABILITY

1.34 When the freedom of the press is considered, a question arises: Whose freedom is it? According to the Statement of Principles adopted by the American Society of Newspaper Editors,

Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private.³⁰

1.35 The Code of Ethics, adopted by the U S Society of Professional Journalists, says:

Freedom of the press is to be guarded as an inalienable right of people in a free society.³¹

1.36 Thus it can be seen that the press is performing an important public function. At the same time the press is not a public institution. As pointed out by Rajeev Dhavan, its ownership pattern, methods of public accountability, channels of promoting equal access to all the members of the public, and working pathology are such

³⁰. Article II of the Statement of Principles, adopted by the ASNE board of directors, 23 October 1975: this code supplants the 1922 code of ethics ("Canons of Journalism").

³¹. The Code of Ethics adopted by the 1973 annual convention of Sigma Delta Chi.

that it must be treated as a private enterprise. It only performs certain functions which are important to the public. Whereas there is public interest in maintaining certain institutions like judiciary, there is also a public interest in maintaining the freedom of expression of individuals and ensuring that these individuals - whether in the form of the press or otherwise - should be allowed to perform certain functions which are in the public interest.³² An attempt has been made to try and balance various aspects of the public interest and it is in this context that the problem of accountability assumes importance.

1.37 Increasingly, readers are being given the opportunity to talk back to newspapers, in "op-ed" pages, expanded letters-to-the-editor sections or before the press councils. The Sigma Delta Chi code of ethics supports the philosophy behind these relatively recent developments:

Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such

³². Dhavan, Contempt of Court and the Press (1982), p.174.

material by individuals whose competence, experience, and judgment qualify them for it.

Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.³³

1.38 External regulation especially government action being an unbearable anathema, the golden mean is self-regulation by the profession itself. The first British Royal Commission on the Press had also felt that the means of maintaining proper relationship between the press and the society lay not in government action but in the press itself. It is out of this concern that the concept of a Press Council or a Court of Honour had evolved.

³³. Swain, Reporters' Ethics (1978), pp 106-07.

CHAPTER 2

THE CONCEPT OF A REGULATORY MECHANISM

The sole aim of journalism should be service. The newspaper press is a great power, but just as unchained torrent of water submerges the whole countryside and devastates crops, even so an uncontrolled pen serves but to destroy. If the control is from without, it proves more poisonous than want of control. It can be profitable only when exercised from within.

Mahatma Gandhi

2.1 The concept of a regulatory mechanism for the press had originated in Sweden, the country which contributed the ingenious idea of setting up an Ombudsman with authority to inquire into and pronounce upon grievances of citizens against the executive branch of government. The Swedish Press Council, called the Court of Honour, was set up in 1916, and it is a voluntary body composed of representatives of the press. There is also an Ombudsman of the press who is generally a professional judge. All complaints against the press are first screened by the Ombudsman, and if found worth inquiry, are forwarded to the Press Council for consideration.

2.2 Today there are more than four dozen press and media

councils in various countries. A few of them, including those in India, Italy, the Netherlands and Turkey, have been set up under the statutes. The composition and complexion of the councils differ: the Italian and Dutch Press Councils have nothing to do with publishers and confine their activities to the maintenance of professional standards of journalists. The Netherlands Council consists of two journalists, two non-journalists and a jurist as Chairman. Norway's Press Council also has lay members whereas the Austrian and Burmese Press Councils have no lay members. In Denmark and Germany, the Councils address themselves only to publishers. The Australian Press Council strives to promote the people's right to be well served by a "free, courageous but self-restrained press". In Canada the Press Council "helps to foster a sense of professionalism" as also to set standards and encourage journalists to discuss their problems on an organised basis.

2.3 Free enterprise, as pointed out by H Phillip Levy, is a prerequisite to a free press, and free enterprise in the case of newspapers would generally mean commercially profitable enterprise.¹ However, the claims of society and the claims of commerce have to be

¹. H Phillip Levy, The Press Council: History, Procedure and Cases (New York: Macmillan, 1967), p.8.

reconciled without any government interference. The best way is self-regulation by the profession itself. The means of maintaining the proper relationship between the press and society, as observed by the First Royal Commission in England, lay not in government action but in the press itself.

2.4 The concept of a press council as a self-regulatory mechanism, free from interference and influence of government, has been described as a mechanism for media responsiveness to the public.² The MacBride Commission, set up by the UNESCO, has said:

We are convinced that the widespread establishment of such bodies would foster the gradual elimination of news distortion and would encourage democratic participation, both essential ways to future communication.³

2.5 However, there is another philosophical view, expounded by John C Merrill of Columbia University and others, that the press councils amount to interference in the freedom of the press. Merrill says:

... the individual journalist should resist any effort to take the decision-making out of the hands of individual medium and invest it in some outside authority. Such outside authorities would include any branches of government, advertisers or pressure groups, including press councils, the professional

². Sandman, Rubin and Sachman, Media, p.8.

³. Many Voices, One World, p. 248.

organisations or societies of any kind.⁴

2.6 This radical libertarian view is not shared by many. Describing the Press Council as a buffer between the press and the public, Justice Mudholkar, first Chairman of the Press Council of India, says:

It is the Press Council that the journalist, the proprietor, the government and ordinary newspaper reader can look up to for safeguarding the freedom of the press. It is the Council and the Council alone that can be the guardian of the press in this country. If at any time the Council chooses to remain dormant one would say that the freedom of the press is in danger.⁵

Another Chairman of the Council, Justice A N Grover, considers the role of the Press Council as "essentially to be of an impartial arbitrator on issues affecting flow of information in general and the press freedom in particular".⁶

GENESIS IN BRITAIN

2.7 It was the British Press Council, established in 1953, which served as a model and provided an impetus for the setting up of such councils in many countries in the sixties.⁷ The idea of establishing such a council can be traced to the Report of the Royal Commission on the

⁴. Merril, The Imperatives of Freedom: A Philosophy of Journalistic Autonomy, p.12.

⁵. Mudholkar, Press law, Tagore Law Lectures, p. 127.

⁶. The Press Council of India Review, April 1980.

⁷. The British Press Council was abolished and the Press Complaints Commission came into being on 1 January 1991. The main difference between the Press Council and the Press Complaints Commission is that while the Press Council was also responsible for the preservation of the freedom of the press, the Press Complaints Commission has only to ensure a decent standard of conduct by British newspapers. Besides, the Commission, while dealing with complaints against the press, is to be guided by a code of conduct.

Press, presented to the British Parliament in 1949. The Commission was appointed in 1947 with Sir David Ross of Oxford University as its Chairman to inquire into the finance, control, management and ownership of the press with the object of "furthering the free expression of opinion through the press and the greatest practical accuracy in the presentation of the news". Though it was generally agreed that the British Press was inferior to none in the world, the Commission found much to criticise. Pointing out the fact that a newspaper is produced by a profession grafted on to a highly competitive industry, the Council found that the ideals of the profession could only be realised within the conditions set by the industry. Caught betwixt the delicate and difficult problem of reconciling the claims of society and the claims of commerce, the Commission recommended that the press itself should create a central organisation which should be called the General Council of the Press.

2.8 The envisaged objects of the General Council were to safeguard the freedom of the press; to encourage the growth of the sense of public responsibility and public service amongst all engaged in the profession of journalism - that is, in the editorial production of newspapers; and to further the efficiency of the profession and the well-being of those who practise it.

Being a voluntary body to be set up by the press, the Council would depend for its effectiveness on its moral authority rather than on any statutory sanctions.

2.9 The Report of the Royal Commission was debated by the House of Commons on 28 July 1949. Following the debate, the Newspaper Proprietors' Association and the Newspaper Society met to consider how the Press Council envisaged by the Royal Commission was to be established. However, the endeavour was lackadaisical as the press was in no hurry to forge fetters for itself. Two years elapsed before the proprietors were able to produce a draft constitution and another two years passed in debating such questions as what the function of the Press Council was to be, what representation on the Council was to be accorded to the various constituent bodies and whether representatives of the public should be admitted to membership. Perturbed by the unconscionable delay, Mr C J Simmons introduced a private member's bill to establish a Press Council by legislation. Though the Bill made no further progress after the second reading, the steps taken to set up a statutory body seem to have had the desired effect of expediting the work of the joint committee. Finally, the press, more under duress than of its own free will, set up a Press Council of its own making. Had it delayed doing so much longer it was

virtually certain that Parliament would have imposed one by legislation. The press might be divided in its views on a number of matters but was quite united in its opposition and resistance to statutory control, the very negation of freedom of the press. A free press required freedom to govern itself. The creation of the Press Council gave it the opportunity to do so.⁸

2.10 The British Press Council came formally into existence on 1 July 1953.

The Constitution of the Council

2.11 In the beginning the British Press Council was a professional body consisting entirely of representatives of the newspaper industry and having as its chairman a member of the press. This departure from the recommendation of the Royal Commission was corrected on the recommendation of the Second Royal Commission (under the chairmanship of Lord Shawcross) when a new constitution was adopted on 1 July 1963. The former title 'The General Council of the Press' was revoked, and the new title 'The Press Council' was substituted. The objects, recommended by the First Royal Commission and set out in the 1953 constitution, were re-adopted with

⁸. Supra note 6, p.10.

slight amendments. As they stand today the objects are:⁹

(i) To preserve the established freedom of the British Press.

(ii) To maintain the character of the British Press in accordance with the highest professional and commercial standards.

(iii) To consider complaints about the conduct of the press or the conduct of persons and organisations towards the press; to deal with these complaints in whatever manner might seem practical and appropriate and record resultant action.

(iv) To keep under review developments likely to restrict the supply of information of public interest and importance.

(v) To report publicly on developments that may tend towards greater concentration or monopoly in the press (including changes in ownership, control and growth of press undertakings) and to publish statistical information relating to them.

(vi) To make representations on appropriate occasions to the government, organs of the United Nations and to press organisations abroad.

⁹. Art 2 of the Articles of Constitution of the Press Council approved by the Newspaper Proprietors Association Ltd., The Newspaper Society, The Scottish Daily Newspaper Society, Scottish Newspaper Proprietors' Association, The Institute of Journalists, The National Union of Journalists and The Guild of British Newspaper Editors.

(vii) To publish periodical reports recording the Council's work and to review from time to time developments in the press and the factors affecting them.

2.12 Under the 1953 constitution the Council contained no representatives of the public, but consisted of 20 members, all representatives of, and appointed by, the constituent organisations on an agreed allocation. When the Council was reconstituted in 1963, the professional representatives were reduced by five, and five lay members were appointed in their place. In this way the first Royal Commission's recommendation that the Council should consist of 25 members, representing proprietors, newspaper and other journalists, and lay members amounting to 20 per cent including the chairman, was met. The first independent chairman chosen was Lord Devlin, a judge whose exceptional legal talents had taken him to the House of Lords, and who had the further advantage of great experience of public service in other fields. The third Royal Commission suggested in 1977 parity between lay and journalist members in the matter of rights and privileges for the purpose of instilling greater public confidence regarding the impartiality and efficiency of the Council. Since 1977, the stature of the Council has undoubtedly grown year by year, as indeed has the amount of work with which it deals.

IN THE U.S. AND ELSEWHERE

2.13 In the United States, where any restraint on the press is constitutionally abhorrent, the proposal for the establishment of a press council made by the Hutchins Commission on Freedom of the Press in 1947 was rejected by most news organisations. It was only in 1973 that a National News Council, on the lines suggested by the Hutchins Commission, was created "to serve the public interest in preserving freedom of information and advancing accurate and fair reporting of news". Its members and advisers, numbering 20 in 1975, included five lawyers (two former State Judges), one member of Congress, ten media representatives, one businessman, two civil rights leaders (one from the clergy), and one educator.

2.14 When the Second International Conference on Press Councils and similar bodies was held in Kuala Lumpur in 1989, in compliance with the mandate of the first such conference held in 1985 (also at Kuala Lumpur), 109 delegates participated.¹⁰ This as well as

¹⁰. The representatives included those from Australia, Canada, Czechoslovakia, Denmark, India, Indonesia, Korea, New Zealand, Nepal, Norway, the Philippines, Sweden, Sri Lanka, Thailand, Turkey, Vietnam, the United Kingdom, the United States of America and the Union of Soviet Socialist Republics.

the Third International Conference held in New Delhi in 1992 affirmed the Kuala Lumpur declaration of 1985 and reaffirmed their adherence to the concept of a free and responsible press as enunciated in it. According to that declaration:

1. The right of free speech is a fundamental and inviolable human right. Freedom of the press is an essential corollary of that right. That freedom is neither a proprietary right of publishers nor a privilege of journalists; it is the right of the people to be informed.
2. Freedom of the press involves the corresponding duty of responsibility upon the press, involving the acceptance of and compliance with high ethical standards by editors and journalists.
3. The institution of press councils and similar bodies is a desirable method whereby the freedom of the press and the corresponding duty of responsibility may be developed and enhanced.
4. The method whereby a press council or

similar body is constituted is a matter for each country or region, and will necessarily reflect such factors as its legal traditions, constitution, socio-economic development, culture and civilisation. However constituted, a press council or similar body must be autonomous and independent of government or any other outside interference.

2.15 The Australian Press Council has suggested the constitution of a World Association of Press Councils. Though the Press Council of India does not think it advisable to have such a formal association, because of its financial implications, it feels that informal arrangements like holding periodical international conferences of press councils and other press regulatory bodies would be preferable.¹¹

¹¹. Press Council of India, (1991-92) Ann. Rep. 27.

CHAPTER 3

EMERGENCE AND REVIVAL OF THE PRESS COUNCIL

^Quis custodiet ipsos custodes? (Who will guard the guards themselves?)
- a rhetorical query by second century Roman satirist Decimus Junius Juvenalis.

3.1 The first Press Commission of India expressed mixed feelings about the "standards and performance" of the press.¹ It observed that despite shortcomings such as yellow journalism, sensationalism, malicious attacks on public men, indecency and vulgarity, the country possesses a number of newspapers of which any country may be proud of. Many journalists who appeared before the commission assured it that "if the responsibility of regulating the profession is left to the journalists themselves, they would enhance the prestige of the profession and ensure that Indian journalism progresses along healthy lines".²

¹. Report of the First Press Commission (1952-54), Chapter XIX, pp 339-56.

². Ibid, p. 352.

3.2 The Commission concluded that the best way of maintaining professional standards in journalism would be "to bring into existence a body of people principally connected with the industry whose responsibility it would be to arbitrate on doubtful points and to censure anyone guilty of infraction of the code." The body recommended by the Commission was a statutory all-India Press Council.³ Maintaining editorial independence, objectivity of news presentation, fairness of comment, fostering the development of the press, protecting it from external pressures and regulation of the conduct of the press in the matter of such objectionable writing as was not legally punishable were also suggested as the objects and functions of the proposed Council.

3.3 The Press Council of India was first established in 1966 under the Press Council Act, 1965 with the object of "preserving the freedom of the press and of maintaining and improving the standards of newspapers in India".⁴ Though the first Press Commission had recommended the setting up of such a statutory and autonomous body as early as in 1954, it came into existence only at the end of a duodecennial exercise of chequered legislation. The Bill introduced in 1956 for

³. Ibid, pr. 947, p. 352.

⁴. Preamble of the Act.

the constitution of a press council lapsed with the dissolution of the Lok Sabha in 1957 and nothing was done hereafter, despite the continuing demand from various journalist organisations, till 1962 when the National Integration Council called for the immediate establishment of a press council. A fresh Bill was introduced in the Rajya Sabha in July 1963 and, for lack of priority in the government list of parliamentary business, it took two full years for it to become an Act⁵ on 12 November 1965. Even then it took another eight months for the actual establishment of the Council on 4 July 1966 with Justice J R Mudholkar, a sitting judge of the Supreme Court, as chairman.

3.4 The very concept of the Press Council emphasises the fact that it is a representative body of the press as a whole; yet it was bogged down in the quagmire of competing sectional claims over its composition. The pulls and counter pulls became so intense as to take the issue of composition to the court. However, the Delhi High Court dismissed the writ petition, rejecting the contention that the Council was not constituted in accordance with statutory provisions. Irked by the controversy, Justice Mudholkar resigned and Justice N Rajagopala Ayyangar, a retired judge of the Supreme

⁵. The Press Council Act (34 of) 1965.

Court, took over as Chairman in May 1968.

3.5 The Statement of Objects and Reasons of the Press Council Act, 1965 stated the broad expectations from the Council which was to be "an autonomous body ... and was to regulate its own procedure". It was "to safeguard the liberty of the press, evolve and maintain standards of journalistic ethics, keep under review developments tending towards monopoly and concentration of control and promote research and provide common services for the press". It was to consist of "people principally connected with the press ... as well as a few members ... representing the interests of education, literature, law and culture ... and also public opinion through three members drawn from Parliament. The procedure laid down by Section 4 of the Act for the selection of the Chairman was that he would be nominated by the Chief Justice of India. According to the same Section, 22 other members were to be selected by a three-member selection committee comprising the Chief justice of India, the Chairman of the Press Council and a nominee of the President of India. Of the 22, thirteen were to be from among the working journalists, including not less than six editors who did not own or carry on the business of management of newspapers. Of the editors not less than three were to be of newspapers published in Indian

languages. Six members were to be nominated from amongst persons who owned or carried on the business of management of newspapers. The rest of the three members were to be from among the nominees of the University Grants Commission, Bar council of India and the Sahitya Academy. Three members of Parliament - two from the Lok Sabha - were to be nominated by the presiding officers of the two Houses. The Chairman and members were to hold office for three years. The tasks of the Council were widely enumerated to include helping newspapers to maintain their standards, build a code of conduct, maintain high standards and "foster a due sense of both the rights and responsibilities of citizenship," to encourage a "sense of responsibility and public service among all those engaged in the profession of journalism," to review the concentration of power amongst newspapers and any other factors which may hinder the dissemination of news in the public interest and finally to promote technical research.⁶ However, the powers given to the Council were not so extensive. Apart from the power to censure, it had no power except the power to summon and enforce the attendance of witnesses, to require the discovery and production of documents, to receive evidence on affidavits, to issue commission for the examination of witnesses and documents and to require the publisher of

⁶. Ibid, s.12.

any newspaper to furnish information on such points as the Council deems necessary.⁷

3.6 A 20-member Advisory Committee with the Minister of Information and Broadcasting as chairman was constituted in 1968 to "study the existing Act under which the Press Council of India has been set up and to suggest such amendments as may be considered necessary to enlist for the Council full and effective cooperation from all sections of the press and the public and to enable it to play its due role in preserving the freedom of the press and improving the standards of journalism in the country which are in conformity with the basic objectives of the Council". Based on the report of the Committee, submitted on 31 October 1968, the Press Council Act was amended in 1970. One of the principal changes was to include news agencies within the scope of the authority of the Press Council.⁸ News agencies were also given membership on the Council. The Council was given the responsibility to undertake studies of publications of foreign embassies in India and investigate the extent to which newspapers got subsidies from foreign governments. Endowed with the dual duty of

⁷. Id., s.14.

⁸. The Press Council Act, 1970. Ss 9 & 10. (amending Ss 12 and 13 of the Press Council Act, 1965).

defending the press and of improving professional standards, the Council was now required to "promote a better functional relationship among all classes of persons engaged in the production or publication of newspapers or in news agencies". To its power of censure was added the power to "warn and admonish" journalists and editors. Power was given to require the concerned newspaper to publish the results of the Council's inquiry. The Council could requisition public records from offices and courts. But it was made clear that a newspaper editor or journalist could not be compelled to disclose the source of his information. Though the status of the Council was enhanced to that of a chief negotiator in all disputes relating to the press, those disputes between the proprietors and journalists to which the Industrial Disputes Act, 1947 apply were excluded from its purview.

3.7 In this study we are not very much concerned about the 1965 Act, including its amended version of 1970, except to note that the paramount function assigned to the Council was "to help newspapers and news agencies maintain their independence" and "to build up a code of conduct for newspapers and news agencies and journalists in accordance with high professional standards". Enmeshed in factional controversies, the Council could only

proceed very slowly in the initial stages. As soon as it acquired momentum, its career was wound up as part of the legislation against the press during the emergency,⁹ on the specious plea that "it was not able to carry on its functions effectively to achieve the objects for which the Council was established". This charge did not hold water because in its decade-long existence, the Council had considered nearly 1,000 complaints - mostly either against or by the State Governments - and an awareness was created in the public mind about the role and functions of the Council. Though the Council did not formally evolve a code of conduct, those adjudications, besides redressing the grievances, helped to build up a good case law serving as a code of conduct. Reserving a detailed post-mortem to subsequent chapters, it would be suffice to point out here that the Second Press Commission had declared that it had done useful work and recommended not only its continuance but a larger ambit of its powers and functions. The abolition of the Council was only a corollary to the official attempt to extinguish the flame of freedom during the black days of 1975-77. And viewed in that context, the Repeal Act of 1976 was nothing but an encomium, albeit incognito, to the commendable performance of the Council. And it is pertinent to repeat the words of the first chairman of

⁹. The Press Council Repeal Act, 1976.

the Council:

If at any time the Council chooses to remain dormant one would say that the freedom of the press is in danger.¹⁰

REVIVAL AFTER EMERGENCY

3.8 With the restoration of press freedom after the emergency, the Press Council was resuscitated with the enactment of the Press Council Act, 1978. Though basically a copy of the earlier legislation, the new Act made certain significant changes in respect of the powers of the Council. It was given explicit power to make observations on the conduct of any authority, including the government.¹¹ As a safeguard against frivolous complaints, the Council was given power to reject a complaint in limine if in the opinion of the Chairman there is no sufficient ground for holding an inquiry.¹² In order to make the Council viable, self-dependent and autonomous, it was given power to levy fees from newspapers and news agencies besides receiving grants

¹⁰. Madholkar, J., Press Law (Tagore Law Lectures, 1975), p. 127.

¹¹. The Press Council Act, 1978. Section 15(4).

¹². Ibid, S. 14. During the three-year term of the fourth Press Council (1988-91), a total of 496 cases were adjudicated while 1,195 were dismissed at the preliminary stage.

from the government.

3.9 The British Press Council, when first formed in 1953, consisted of 20 members, all representing the profession. It continued as an exclusive professional body consisting entirely of representatives of the newspaper industry and having as chairman a member of the press till 1963 when it was restructured to include five lay members in accordance with the recommendation of the Royal Commission. The size of the Council was kept the same and Lord Devlin, an illustrious judge, was chosen (by the press itself) as its first independent chairman.

3.10 The 1965 version of the Indian Press Council consisted of a chairman, nominated by the Chief Justice of India, and 25 other members of whom three were from among persons having special knowledge or experience in the field of education, science, literature, law or culture; and three from among the members of Parliament. In the 1978 Act, the number was raised to 28 besides the chairman. The chairman, instead of being solely nominated by the Chief Justice, has to be nominated by a three-member committee consisting of the Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council. Of the other 28 members, 13 shall

be nominated from among the working journalists, six shall be from among persons who own or carry on the business of management of newspapers; one from among persons who manage news agencies; three shall be persons having special knowledge or practical experience in respect of education and science, law and literature and culture, nominated respectively by the University Grants Commission, the Bar Council of India and the Sahitya Academy; and the remaining five shall be members of Parliament.

3.11 Though the Indian Press Council closely resembles the British Press Council in many respects, no uniform pattern can be drawn from a comparative study of different press councils functioning in the world. The constitution of the New Zealand Press Council is on the British pattern. The Swedish Court of Honour, the progenitor of modern press councils, has normally a former judge of the Supreme Court as its president; but in Ontario, a former university president is the chairman of the Press Council. Both in the Austrian and Burmese Press Councils, there are no lay members. In Indonesia all the members are chosen by the government for the exclusive purpose of advising the government on press matters. Though the size of the press is as miniscule as its territory, Israel has the largest press council with

a membership of 30. Though no qualification is prescribed for a person to be appointed as chairman of the Press Council in India, taking into account the quasijudicial nature of the duties and responsibilities entrusted to the Council, a retired judge of the Supreme Court has so far always been appointed as chairman.¹³

3.12 The most important function of the Press Council is to adjudicate complaints; the gradual and steady increase in the number of complaints is an indication of the fact that the performance of the Council is being appreciated and recognised by the people who have great faith and confidence in the functioning of the Council. In its first full annual report (1967), the Council described the importance of this function thus:

The Press Council is intended not only to protect the freedom of the press but also the rights of citizens ensuring that they are served by a healthy, non-scurrilous, public-spirited and independent press. Adjudication of complaints against the behaviour of the press and also behaviour of others towards the press thus constitutes the most important function a press council is required to perform.

¹³. Mr Justice P B Sawant, a former judge of the Supreme Court, succeeded Mr Justice R S Sarkaria as Chairman of the Press Council of India following the expiry of the second three-year term of the latter on 23 July 1995.

3.13 A study of the Annual Reports would reveal a progressive increase in the institution of complaints and their disposal by the Council in recent years with consequent acceleration of the process of building up a code of conduct for newspapers and newsmen. Norms of ethics have now been extended to new areas. Privacy is a typical example of such extension.

CHAPTER 4

THE COUNCIL IN ACTION

4.1 The Press Council with its wide range of responsibilities works through standing committees, the most important of which is the Inquiry Committee. There are six committees: Inquiry Committee (I & II), Selection Committee, Finance Committee, Library Committee and All Purposes Committee.¹ In the matter of functioning through committees, the Press Council of India follows the British Press Council which works through two standing committees: the General Purposes Committee and the Complaints Committee. The General Purposes Committee deals with what has been described as the positive side of the Council's work; this includes keeping under review the law on such matters as censorship, contempt of court and libel, press monopoly and prepare statistical information on these developments. It also handles complaints about the conduct of other people against the press while the Complaints Committee handles the negative

¹. Section 8(1) of the Press Council Act 1978 empowers the Council to constitute from amongst its members any committee for performing its functions.

side of the Council's work, complaints about the conduct of the press.

WHO MAY MAKE A COMPLAINT?

4.2 Dispensing with the rigidity of locus standi, any member of the public is entitled to lodge a complaint² against a newspaper, news agency, editor, or other working journalist, alleging a breach of the recognised ethical canons of journalistic propriety and taste in the publication or non-publication of a matter.³ Cases can also be initiated by any member of the public against a professional misconduct of journalists whether they be on the staff of a newspaper or engaged in freelance work. On the contrary, the British Press Council deals with complaints against newspapers, not against individual journalists; the

². The Press Council Act, 1978. S 14(1). However, as held by the Council in Dr Satyanarayanan Dave v. Indian Express, (1989-90) Ann. Rep. 111, when the impugned criticism is against any individual, right to reply is restricted to the affected person and no third person has locus standi. The rule of locus standi ensures that the process of the Council shall not normally be invoked at the instance of a person who has no special stake or interest in the matter. See Lalit Mohan Gautam v. Indian Express, (1990-91) Ann. Rep. 122.

³. "Matter" means an article, news item, news report, or any other matter which is published by a newspaper or transmitted by a news agency by any means whatsoever and includes a cartoon, picture, photograph, strip or advertisement. Vide Regulation 2(a) of the Press Council (Procedure for Inquiry) Regulations, 1979.

editor accepts responsibility not only for what appears in his newspaper, but also for the behaviour of his staff.

4.3 Limitation of time is provided under regulation 3(1)(f) for filing complaints: within two months in the case of a complaint relating to the publication or non-publication of any matter in respect of dailies, weeklies and news agencies; and within four months in all other cases. In the case of a complaint against an editor or a working journalist, alleging any professional misconduct other than by way of publication or non-publication of any matter, the same shall be lodged within four months of the misconduct complained of. The Council in its discretion may condone the delay. The complaints can be against the press as well as by the press. A newspaper, a journalist or any institution or individual can complain against the Central or a State Government or any organisation or person for interference with the free functioning of the press or encroachment on the freedom of the press.

4.4 Reminiscent of the statutory requirement of issuing notice to the opposite party prior to the launching of the litigation under many enactments, it is a firm rule of the Press Council that before it will

accept a complaint the aggrieved person must seek redress from the editor of the newspaper drawing his attention to what the complainant considers to be a breach of journalistic ethics or an offence against public taste. Such prior reference to the editor affords him an opportunity either to take remedial action or to clarify the position, sometimes to the satisfaction of the prospective complainant.

4.5 Should an aggrieved person fail to obtain satisfaction from the editor, he can then make his complaint to the Press Council.⁴ He should enclose with his complaint copies of correspondence with the editor; if no reply has been received from the editor, the fact should be mentioned in the complaint.

4.6 The complainant has, in his complaint, to give the name and address of the newspaper, editor or journalist against whom the complaint is directed. A clipping of the matter or news item complained of, in original, should accompany the complaint. The complainant has to state in what manner the passage or news item or the material complained of is objectionable. He should also supply other relevant particulars, if any.

⁴. The complaint may be sent to: The Secretary, Press Council of India, Faridkot House (Ground Floor), Copernicus Marg, New Delhi 110 001.

4.7 In the case of a complaint against non-publication of material, the complainant will, of course, say how that constitutes a breach of journalistic ethics.

4.8 In order to nip vexatious or frivolous complaints in the bud itself, the Council is given the power not to take cognizance of a complaint if in the opinion of the chairman there is no sufficient ground for holding an inquiry.⁵

4.9 The Press Council will not deal with any matter which is sub judice⁶. The complainant has to declare that "to the best of his knowledge and belief he has placed all the relevant facts before the Council and that no proceedings are pending in any court of law in respect

⁵. The European Court of Human Rights in Strasbourg is also following a similar practice. Every petition or complaint will be considered first by the European Commission for Human Rights, the investigative arm of the Court. In order to prevent governments having to deal with a vast number of vexatious or unfounded petitions, the Commission has a sub-committee to weed out such cases and to conduct preliminary inquiries. When cases are accepted as bona fide they are first referred to governments, and efforts are made to settle them by friendly negotiations. If these fail, the Commission has the ultimate remedy of referring the case to the Court. See Paul Martin, "Europe's Court of Last Resort," Reader's Digest (Bombay: July 1986), pp. 66-70.

⁶. Dr S. V. Charupure v. Middy, (1989-90) Ann. Rep. 181. Proceedings against the newspaper were dropped by the Council when it was brought to its attention that a suit relating to the impugned report was pending in Bombay High Court. See sec 4(3) of the Act.

of any matter alleged in the complaint". A declaration that "he shall notify the Council forthwith if during the pendency of the inquiry before the Council any matter alleged in the complaint becomes the subject matter of any proceedings in a court of law" is also necessary.

4.10 In Britain, if legal proceedings in respect of the subject matter of a complaint have been instituted or are threatened, the Press Council will defer the complaint until after the proceedings have been concluded or abandoned. If such proceedings are threatened, or if the Council considers they are likely, it will require the complainant either to abandon the proceedings or to wait until they have been disposed of by the court. Where the complainant decides to abandon legal proceedings and proceed with his complaint before the Council, the newspaper is protected from subsequent legal action. The press councils are at best quasi judicial bodies and their proceedings must give way to court proceedings.

4.11 Clement Jones, a former British editor and a member of the British Press Council for eight years, says:

There is also an obligation on the part of the Press Councils not to usurp the courts of law and they should refuse to deal with cases where there is an obvious and serious remedy at law,

unless the complainant gives a clear undertaking not to go to law subsequently, using the Council's adjudication to buttress his legal action.⁷

HOW A COMPLAINT IS DEALT WITH

4.12 On taking cognizance of a complaint, the editor or journalist concerned is asked to show cause why action should not be taken against him. After receiving the written statement and other relevant materials from the opposite party, the secretariat of the Council prepares a dossier and places it before the Inquiry Committee. The Committee screens and examines the complaint in necessary details and, if need be, calls for further particulars or documents. The persons concerned are given opportunity to give oral evidence by appearing before the Committee personally or through their authorised representatives. The British Press Council has so far refused to permit legal representation to prevent its proceedings becoming too formal and legalistic. There the proceedings are informal. However, legal practitioners can also be authorised to appear before the Committee and the Council in India.

⁷. Trikha, The Press Council: A self-regulatory mechanism for the press (Bombay: Somaiya, 1986), p.41.

4.13 After the Inquiry Committee reaches its decision, the findings and recommendations will be forwarded to the Council, which may or may not accept them. The Committee gives reasons for arriving at the conclusions and submits the entire record of the case to the Council. The Council passes orders giving its decisions on every finding contained in the Committee's report or remits the case to it for further inquiry. Many recommended adjudications are accepted by the Council in view of the fact that the Committee before making any recommendation hardly leaves any room for doubt.

4.14 After a decision in Council is reached a summary of the facts and of the recommendation is released for publication. If the Council thinks it necessary or expedient in public interest so to do it can direct any newspaper to publish in the manner the Council deems fit any particulars relating to an inquiry.

Powers of Civil Court

4.15 For the purposes of performing the functions of the Council or holding any inquiry under the Act, it has been provided in Section 15(1) that the Council has the same power throughout India as are vested in a civil

court while trying a suit under the Code of Civil Procedure in respect of:

- (a) summoning and enforcing the attendance of persons and examining them on oath;
- (b) requiring the discovery and inspection of documents;
- (c) receiving evidence on affidavits;
- (d) requisitioning any public record or copies thereof from any court or office;
- (e) issuing commissions for the examination of witnesses or documents; and
- (f) any other matter which may be prescribed.

Section 15(3) further provides that "every inquiry held by the Council shall be deemed to be a judicial proceeding within the meaning of Ss 193 and 228 of the Indian Penal Code". Section 193 deals with fabrication of any evidence in the course of judicial proceedings and section 228 deals with intentional insult or interruption to public servant sitting in judicial proceedings. The legislative intent that the functioning of the Council dealing with any complaint is to be in the nature of a judicial function is made manifestly clear by the various provisions in the Act. However, the lawyers are often told that the Council is not a court of law and the procedure adopted by it is less rigid than the one followed in the courts.

4.16 In a Chandigarh case as well as in the Verghese case, the Council had to threaten the exercise of judicial power to tame recalcitrant respondents. In the case of the Chandigarh journalists, the Government of

Haryana, which had earlier refused to recognise the authority of the Council in the Tribune case, sent its Director of Public Relations to answer the inquiry only upon the threat to use the power to issue summons. In the Verghese case, the Council succeeded to compel the management to produce the complete correspondence exchanged between Mr B G Verghese and Mr K K Birla.

PROCEEDINGS ARE OPEN

4.17 Justice should not only be done but should manifestly and undoubtedly be seen to be done. The proper administration of law in accordance with the rules of natural justice requires that proceedings before a judicial or quasi-judicial body should be held openly and in public. Although the principle may not be universally observed, it is undoubtedly recognised throughout the world as being a basic standard by which the quality of legal systems may be judged.^e

4.18 In Britain the adjudication of complaints is held in private. According to the procedure adopted in 1954, the Press Council would not sit in public or permit reporters to attend its meeting. Commenting on this, the

^e. See J G Starke, "Current Topics: The Right of Freedom of Public Access to Court Proceedings," 63 A.L.J. 155 (1989).

Observer in a leading article of 28 March 1954 said: "Newspapers which claim the right of free reporting in the public interest should be ready to apply the same principle to their own affairs". However, the procedure was not changed when the Council was reconstituted in 1963.

4.19 In India, though every inquiry held by the Press Council shall be deemed to be a judicial proceeding, its proceedings were held *in camera* (till the open court rule was accepted in 1986) and requisite information was released after the matter stood adjudicated. Needless to say this was a negation of the fundamental freedom of information; and the Council itself received a poser on this when S Sahay, editor of the Statesman, requested admittance to the meeting of the Inquiry Committee hearing the complaint of Mr Balram Jhakar, then Speaker of the Lok Sabha, against the Illustrated Weekly of India.⁹ Sahay claimed that the public had a right to know not only the final conclusions of the Council but also the submissions of the parties so

⁹. 1986 Ann. Rep. 106. The complaint was filed by the Secretary to the Speaker against the Illustrated Weekly of India for publishing a photograph showing Rama Swarup, an alleged spy against whom action under the Official Secrets Act and the Foreign Exchange Regulation Act was taken, with Mr Balram Jhakar. Revising the view taken by the Inquiry Committee, the Council unanimously held that there was nothing wrong in publishing the photograph as it was genuine and newsworthy.

as to be able to judge the soundness or otherwise of the Council's decision since it was on the basis of this case-law that a code of conduct was being built up. According to him:

The Council is entrusted with the task of building up a code of conduct, presumably on a case-law basis. And case-laws can carry conviction only if people are aware of the material and arguments that have shaped the Council's decision. Hence the Council, in my view, owes it to the people and the profession that its proceedings, right from the inquiry stage, are made available to the people through the press.

4.20 In his detailed note, the Chairman, Justice A N Sen, recommended to the Council that it may not, for any valid reason, refuse to permit the press to attend and watch the proceedings before the Inquiry Committee or the Council. The Press Council which has been established for the purpose of preserving the freedom of the press may not itself be considered guilty of denial of legitimate freedom to the press, he said.

4.21 Accepting the recommendations of the Chairman, the Council at its meeting in August 1986 decided as follows:

- i. Members of the public, including the press, should be allowed to attend and watch the

proceedings before the Inquiry Committee and also before the Council;

- ii. In an appropriate case, the members of the Inquiry Committee may decide to exclude all outsiders, including the members of the press, at the hearing of a particular complaint. The decision of the Inquiry Committee should be either unanimous or by consensus failing which the decision by a majority of the members present at the Inquiry Committee meeting should prevail.¹⁰
- iii. After the hearing of a complaint has been concluded before the Inquiry Committee and when members choose to deliberate amongst themselves about the decision to be recommended to the Council, no outsider, including any member of the press, and even the parties to the proceedings will be permitted to remain present.
- iv. At the time of consideration of the recommendations of the Inquiry Committee by the Council, the Council may also exclude the members of the public, including the press, at the time of mutual discussion and deliberation, if the Council considers it to be fit and proper. Any such decision by the Council, if not unanimous or by consensus, must be by a majority of the members present at the meeting.¹¹

4.22 There was no difficulty for the Council to make its proceedings open because neither the Act nor the Regulations states anywhere that the proceedings will be held in private. The fact that the Indian Press Council,

¹⁰. In the constitution of the Alberta Press Council there is a provision in Art 4(c) which reads - "Meetings of the Council shall be open to the public unless a majority of the members present agree otherwise".

¹¹. For details of the observations and deliberation of the Council, see 1986 Ann. Rep. 219- 227.

unlike its British counterpart which is an exclusive professional organisation of the journalists, is statutory in nature was also overlooked when earlier Justice N Rajagopala Ayyangar, in his capacity as Chairman of the Council, refused to oblige to a strong plea for permitting the press to report the proceedings in the Verghese case. In 1984, the then Chairman, Justice A N Grover, took strong exception to the publication of proceedings before the Inquiry Committee when the case had not yet been disposed of.

DECISIONS BY CONSENSUS

4.23 The decision of the Press Council is taken by majority of votes of members present and voting in any meeting. In the event of the votes being equal, the Chairman shall have a casting vote and shall exercise it. However, the Council generally takes decisions by consensus. Moral authority and universal acceptability being the main sanction of the Press Council, it is advisable that it should always strive to reach decisions by consensus. Recourse to voting will ultimately lead to external lobbying and internal grouping which will greatly diminish the stature and prestige of a very important body. Public trust is important because its decisions are final. They cannot be questioned in a court

of law except by invoking the writ jurisdiction of the High Courts or the Supreme Court.

4.24 The opinion expressed by the Council subserves two useful purposes: (1) That any abuse of press freedom does not pass without anybody noticing it or raising a finger of protest, and (2) that the press should not, in its own interest, indulge in scurrilous or other objectionable writings - writings such as have been considered below the level of recognised standards of journalistic ethics by a fair-minded jury like the Council constituted mainly of the press itself. That much restraint is necessary to preserve a much prized freedom.

Chapter 5

FOR AND AGAINST SANCTIONS

5.1 The protracted debate on the desirability of conferring penal powers on the Press Council still lingers without any chance of arriving at a consensus. In the absence of punitive powers, the Council is often denigrated as a toothless tiger; but the detractors fail to understand that this self-regulatory mechanism is rested exclusively on moral authority and public esteem. Apart from stray instances of imposing fine, expelling members or withholding press passes, press councils all over the world are satisfied with the sanction of a public condemnation.

5.2 The British Press Council's main sanction was the obligatory publication of the adjudication in full, though there was no requirement to allocate it any particular position or prominence.¹ This is the case

¹. Lord McGregor of Durriss, Chairman of the Press Complaints Commission (the present version of the British Press Council), was quoted by The Times (London) in September 1991 as saying that no newspaper had yet repeated a violation of the industry's code of conduct. If there was evidence of systematic flouting of the

with most press councils; but in Belgium the Council of Discipline and Arbitration of the General Association of the Belgian Press (a press council of sorts) can expel members or suspend a journalist's press pass. The progenitor of press councils, the Swedish Court of Honour, can impose an administrative fine of skr 1,000 to 3,000 on delinquent newspapers besides requiring them to publish the censure. Except the solitary example of Sri Lanka where the Press Council is functioning as a district court with penal sanctions for its contempt, in almost all other countries where there are press councils the sanction is what might be called self-condemnation by compelling the concerned newspaper to publish the adjudication which has gone against it.²

5.3 After examining the issue of penal powers, the First Press Commission of India recommended that the Press Council should have the authority to censure objectionable types of journalistic conduct. Accordingly statutory power was given to the Council to censure any newspaper, editor or journalist³ if it was proved that the concerned newspaper had offended against the

Commission's ruling, he said, the next government could introduce statutory regulation.

². Trikha, *The Press Council: A self-regulatory mechanism for the press* (Bombay: Somaiya, 1986), p 51.

³. Sec 13 of the Press Council Act, 1965.

standards of journalistic ethics or public taste or the editor or the working journalist had committed any professional misconduct or a breach of the code of journalistic ethics. This power of the Council was made final and it was made clear in the Act that the decisions rendered by the Council should not be questioned in a court of law, subject to the condition that the Council would not hold an inquiry into a matter which was sub judice. By the Amendment Act of 1970, the Council was given further power to warn or admonish the offender as also to disapprove the conduct of the editor or a journalist. Section 13 of the Act was amended to give the Council an express authority to require any newspaper to publish in such manner as the Council thinks fit any particular relating to any inquiry against a newspaper or news agency, an editor or a working journalist including the respective names. Thus the Press Council of India had the power to warn, admonish, censure or to express disapproval and to require a newspaper to publish its adjudication and those powers remained in tact till the Council was abolished in 1976.

5.4 Under the de novo Act of 1978 an express provision was made enabling the Council to make observations on the conduct of any authority, including

government.⁴ But even prior to the incorporation of this provision, it was held in a Bihar case⁵ that it should be the duty of the Press Council to inquire into complaints against the government in order to maintain the independence of a newspaper. The court rightly held in that case that the independence of a newspaper would be jeopardised where the government throws out an allurements of serving on governmental bodies of high rank and status to editors who have been freely criticising the policies and acts of the government.⁶

5.5 The Press Council itself felt that it required some minimum powers to enforce its decisions in order to meet a situation arising out of the defiance of the Council's directions by recalcitrant newspapers. At its meeting held in Shimla in 1980 the Council decided to approach the Government to insert an express provision in the 1978 Act empowering the Council to recommend to the authorities concerned denial of certain facilities and

⁴. Sec 15(4) of the Press Council Act, 1978.

⁵. State of Bihar v. Press Council of India, A.I.R. 1975 Pat 79.

⁶. The problem still persists compelling the Press Council to set up a committee to make a thorough inquiry about journalists who have availed of personal benefits during the last 10 years. "The Council can publish names of such journalists and even has a right to issue summons against them," the chairman, Justice P B Sawant, told newsmen at Shirdi. Hindustan Times, New Delhi, 29 December 1995.

concessions in the form of accreditation, advertisements, allocation of newsprint or concessional rates of postage for a certain period in cases of newspapers which were censured thrice by the Council. Acceptance of the Council's recommendations was sought to be made obligatory. Justice A N Grover, the then Chairman of the Council, in his evidence before the Second Press Commission in 1981 reiterated the need for conferring penal powers on the Council.

5.6 The Council has undergone three phases of thinking on the subject. Under the chairmanship of Justice Grover penal powers were considered desirable and necessary; under Justice A N Sen's tenure as Chairman, the question had been considered in depth and then buried as any such powers, if given, could be misused by the government; and under Justice Sarkaria's chairmanship the old question of "teeth" for the Council was again resurrected. As such it is worthwhile to examine this question in detail.

5.7 In our constitutional context where a balance is sought to be achieved between competing social interests, any restriction on the freedom of the press shall pass the test of reasonableness envisaged in Art 19(2). The State is empowered to impose by law restrictions on the

freedom of the press; the judiciary is empowered to determine whether in a given case such restriction is reasonable.⁷ It is not necessary for the purpose of this study to go into this question in detail. It is sufficient to mention just a few relevant norms derived by courts from Art 19(1)(a) pertaining to freedom of the press. Thus, imposition of pre-censorship on a newspaper,⁸ or prohibiting a newspaper from publishing its own views, or those of its correspondents, on a burning topic of the day,⁹ or imposing a ban upon entry and circulation of a journal within a state¹⁰ - all such restrictions are regarded as infringement of Art 19(1)(a). To crown it all, the Supreme Court has ruled in the 1994 Nakkeeran¹¹ case that the government has no

⁷. Indian Express Newspapers v. Union of India, (1985) 1 S.C.C. 641. (Paragraphs 82, 91-93).

⁸. Brij Bhushan v. State of Delhi, A.I.R. 1950 S.C. 129.

⁹. Virendra v. State of Punjab, A.I.R. 1957 S.C. 896.

¹⁰. Romesh Thappar v. State of Madras, A.I.R. 1960 S.C. 124.

¹¹. R Rajaopal v. State of T N, A.I.R. 1995 S.C. 264. The facts show that the prison authorities attempted to prevent Nakkeeran, a Tamil weekly, from publishing the autobiography of Auto Shankar, who had been sentenced to death. The announcement that the weekly was about to publish the autobiography alarmed several officials and politicians who feared that their nexus with criminals would be exposed. The Supreme Court held that the government had no authority to impose prior restraint on the press to prevent publication of the alleged matter irrespective of the fact that it is defamatory or not.

legal authority to impose any prior restraint on a newspaper, preventing it from publishing materials defamatory of government officials. Attempts to regulate the commercial aspects of the newspaper were also scoffed at by the Supreme Court as contrary to the constitutional mandate.¹² The courts will thus abhor denial of advertisements and withdrawal of postal concessions as unconstitutional.

5.8 In view of this constitutional protection, the Press Council had to clarify that the proposed punitive restrictions were to be moulded and given effect to within the permissible limits of Art 19(2). It was also decided that the penal powers of the Council would be exercised against newspapers and journalists only if they err three times within a period of three years. The Press Commission (1982) endorsed this suggestion with an enlargement that a newspaper would invite sanction if it attracts adverse notice of the Council thrice, whether by way of disapproval, warning, admonition or censure and not only by censure as suggested by the Council. However, the Council was modest enough to reiterate its earlier stand while commenting on the recommendation of the Commission. Caught between the conflicting views on the

¹². Supra note 5; Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305; Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106.

issue, one totally opposed to any punitive power for the Council and the other favouring some teeth for its effectiveness, perhaps it might be as a sort of compromise that the Council had proposed this limitation. Even this limited claim, however, was opposed by sections of the press, particularly the Editors' Guild of India. An apprehension, albeit reasonable, was made that the government might take advantage of these powers to make the Council an instrument to punish inconvenient newspapers and newsmen. As a result of all these criticisms, Justice Grover, while addressing a seminar organised by the Haryana Union of Journalists at Faridabad on 20 August 1983, said the Press Council was a friend of the press and if the press did not want it to have these powers, it would not press for them. Recalling those developments, the Council said in its 1987 Annual Report:¹³

The all purpose committee of the Council was authorised to reconsider the matter. After detailed debates, the Council was of the opinion that, in the prevalent conditions, these powers could tend to be misused by the authorities to curb the freedom of the press. It, therefore, withdrew its demands for extension of penal powers to the Council.

¹³. at p. 7.

5.9 The question whether the Council should be clothed with penal power still remains unanswered. Though the history of freedom of the press in England is a triumph of the people against the power of the licenser,¹⁴ a member in the House of Commons, Mr John Gorst, participating in the debate on the setting up of the Third Royal Commission on the Press, went to the extreme extent of wondering "whether the Government will, in the end, have to consider whether there should be a licence to print the newspapers - a licence to print which a press council with a real teeth should have the legitimate opportunity, as a last ditch sanction, to withdraw if a newspaper continually flouted the accepted practices of the day." Fortunately this disillusionment with the powers and functioning of the Press Council was not shared by many; Mr Alex Lyon, another member, said: "The only sanction against him (the editor of a newspaper) is the sanction of exposure to condemnation by the Press Council which condemns in such an inoffensive manner". Drawing an important distinction between the profession of journalism and other professions like law, medicine or accounting, Mr Lyon, a barrister, further said: "It (the Council) has no power to penalise or to restrict the continuation in the profession of a

¹⁴. Vide Macaulay, History of England (1872), Vol IV, p 78; Cf. Lovell v. Griffin, (1938) 303 U.S. 444 (451).

journalist because journalism is not a closed profession in the same way as the legal profession or accountancy with a ruling body which can expel if there is a breach of the code of ethics".¹⁵

5.10 Contrary to the stand taken by some chairmen of the Indian Press Council, the power of public condemnation has been commended by the lay chairmen of the British Press Council. Lord Devlin said in 1969 that "the theoretical defect that the Press Council was without teeth was cured by the uncoordinated decisions of editors to publish adjudications against their newspapers". According to Lord Pearce "to be compelled to print in your own newspaper your own condemnation is a serious matter".¹⁶

5.11 The First Royal Commission had occasion to examine the suggestion of setting up a Registration Council, analogous with similar arrangements in the Bar Council and the Medical Council, with powers to keep register of qualified journalists and to check all members for professional misconduct or in the alternative to create a single professional association comprising

¹⁵. Trikha, The Press Council: A self-regulatory mechanism for the press, Somaiya Publications, Bombay, 1986, p. 57.

¹⁶. Ibid, pp 57-58.

all staff journalists and vested with power to expel erring members. The suggestion was rejected on the ground that such arrangements would result in the conversion of the profession of journalism into a closed profession. Since journalism is and ought to be an open profession, such closed shop practices are anathema in the context of freedom of expression. Reiterating the faith in the efficacy of the non-punitive nature of the Council's powers, the Third Royal Commission on the Press in 1977 proposed wide ranging powers for the Council including the authority to investigate records of publication or a particular journalist to be able to censure newspapers for publishing contentious opinions based on inaccurate information. For the offending journalist it suggested that the Council should ensure that his humiliation is more obvious. It also suggested that the Council should be given power to take up investigation suo moto into the conduct of a newspaper without waiting for a formal complaint.¹⁷

5.12 Coming to India, a committee consisting of eminent journalists and jurists which was set up by a seminar held in New Delhi in 1977 under the auspices of the Institute of Constitutional and Parliamentary Studies disfavoured the idea of giving more teeth to the Press

¹⁷. Id, p. 58.

Council than its power to summon individuals and documents. However, a former Chairman of the Press Council, Justice Rajagopala Ayyangar, said from his experience that sanctions like reduction in advertisement quota had become necessary to deal with recalcitrant newspapers which did not care even repeated censure. As for the sanctions against erring State or public authorities, he felt that a strong verdict against them had a telling effect.¹⁸

5.13 Justice Ayyangar's position, however, was not shared by many. His successor in office, Justice A N Sen, was against arming the Council with "more powers" as the existing provisions were "sufficient" to pull up an erring newspaper. Addressing a news conference at the end of a six-day Council sitting in Calcutta, he said, "I have been all through against further power for the Council".¹⁹

5.14 Apart from the reasons mentioned in the 1987 Annual Report, Justice Sen had yet another reason for not wanting penal powers. He felt that conferment of powers like imposition of fine or jail or damages would have the effect of usurping the power of the courts and would

¹⁸. Id., p. 59.

¹⁹. The Hindu, 9 January 1989.

involve the Council in undesirable litigation. If the Council was authorised to impose any punishment which the courts were entitled to award, there would be not only a parallel jurisdiction but all decisions and orders passed by the Council may become the subject-matter of appeal. Notwithstanding the powers conferred on the Council, the right of an individual to approach the ordinary courts will remain in tact. In short, the status of the Council would get compromised which will not be desirable for a body which is meant to foster self-regulation for the press.

5.15 S Sahay, an eminent editor, gives yet another reason why penal powers the Press Commission had in mind are to be viewed with suspicion. He says:

As stated earlier, the penalties suggested were withdrawal of accreditation, denial of advertisements and postal facilities. All these lie, basically, within the province of the government. Any move that would appear to bring the Press Council nearer to the government can only be detrimental to the freedom of the press.

Imagine an obliging press council under a pliant chairman anticipating the whims of the government of the day and merrily punishing

"offending" newspapers and journalists.²⁰

5.16 Prem Bhatia, another eminent editor and former member of the Press Council, raises some pertinent questions in this regard.²¹ One of these is that resort to moral authority is based on the assumption of a sensitive response by the party against whom such authority is applied. Should newspapers found lacking in propriety refuse repeatedly to let their readers know that their conduct has been found to be faulty, what does one do? In all fairness, unfavourable as well as favourable verdicts should be published as an ethical duty by those concerned. Such action would be a test of the editor's professional conscience. But what if the conscience is put to sleep?

5.17 After analysing the pros and cons of this issue, Dr N K Trikha, a senior journalist and former member of the Press Council, says:

Considering the question in all these aspects one would be inclined to agree with the view that for a press council sanctions should be of a moral nature. At the same time a very strong opinion should be built up in the profession

²⁰. S Sahay, More Teeth for the Press Council, Newstime, Hyderabad, 21 February 1989.

²¹. Prem Bhatia, Inside the Press Council, Current, Bombay, 15 October 1988.

and amongst the public at large against such newspapers and journalists who violate the code of ethics with impunity, and against governments and other authorities who seek to curb the press and limit its freedom.²²

5.18 Emphasising the strength and effectiveness of the British Press Council's censure, H Phillip Levy rightly observes:

The obligation and moral duty of a newspaper to publish an adjudication of the Council against itself had the effect of reinforcing the Council's condemnation with the condemnation of the public which the publicity ensured. Nothing can be more disparaging and unwelcome to a newspaper which values its good name than to be obliged to publish to its readers a judgment of the Press Council that it has infringed journalistic standards.

The answer, therefore, to the question whether sanctions are necessary, is that they are not, and the Press Council has proved it. Sanctions of a punitive nature would be as repugnant to the Council as they appeared to the Royal Commission. The role of the Press Council is that of an educator; its method is persuasion not force; its weapon is publicity not punishment; its appeal is to conscience and fair play. In a free press sanctions would be an incongruity.²³

²². Supra note 15, p.61.

²³. See Levy, The Press Council: History, Procedure and Cases, (London: Macmillan, 1967), p. 466.

5.19 The Third International Conference on Press Councils and Similar Bodies, held in New Delhi in October 1992, considered the proposal that press councils be endowed with sanctions and powers in addition to the moral sanctions that they enjoy now. Observing that such a move would militate against the basic premise that the press councils provide a democratic, efficient and inexpensive facility for the hearing of complaints, the conference resolved that the press councils should not seek nor be granted the power to impose additional sanctions.²⁴

5.20 It is not easy to conclude whether sanctions are necessary for the Press Council to protect innocent victims from the recalcitrance of newspapers and journalists. Though the arguments arranged in the foregoing paragraphs against the conferment of any such power on the Press Council are valid and acceptable, an impartial observation of the current Indian newspaper scenario will justify the recent assertion made by Justice P B Sawant, the present Chairman, that the Council would assume power to recommend payment of cost and compensation at the time of deciding a case²⁵. This will definitely have a salutary effect in toning up the

²⁴. The Press Council of India Review, 1/1993, pp 187-189.

²⁵. Times of India, Bombay, 24 January 1996.

quality of the adjudicatory jurisdiction of the Council, especially in matters relating to defamation. Otherwise it will be poor consolation for a victim to hear a statement of censure from the Council after a long time without any compensation for the damage. In an era where victimology is gaining ground, this is an aspect which the Council cannot overlook. The compensation so ordered can easily be realised by asking the government to insist on the production of a "no dues certificate" from the Council before paying the advertisement bills. The Council, in order to overcome the scorn that it is a mere paper tiger with rubber teeth, should acquire some power beyond the present power of censure. A recommendation made by the Council last year to the Cabinet Secretary (in case of the Central Government) and the Chief Secretary (in case of the State Governments) to cancel advertisements or other privileges if a newspaper was found guilty twice within a span of two years is worthy of consideration and acceptance. That much power is needed for the Council and that much fear is needed to be instilled in newspapermen.

CHAPTER 6

BUILDING UP A CODE OF CONDUCT

6.1 Under Section 13(2)(b) of the Press Council Act, 1978, the Press Council is authorised to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards. This mandate was there in the 1965 Act also; though no such code appears yet to have been formulated either by the present Council or by the one which was abolished in 1976. At least to this extent Mrs Indira Gandhi's Government was justified when it repealed the Press Council Act in 1976 on the plea that "it (the Council) was not able to carry on its functions effectively to achieve the objects for which it was established".

6.2 Sweden has a code of ethics and Japan has evolved "the canons of journalism"¹. The First Press Commission in India was of the view that formulation of a code of journalistic ethics was one of the prime duties and responsibilities of the Press Council. It also

¹. Trikha, The Press Council: A self-regulatory mechanism for the press, (Bombay: Somaiya, 1986), p. 94.

enumerated the principles which it wanted to find place in the code². Though the recommendation of the Press Commission was to the effect that the proposed Press Council should 'formulate' a code of conduct, the Press Council Act of 1965 made a departure from it and instead laid down that the Council should 'build up' a code³.

6.3 The first Press Council examined the question of framing a code but on consideration of similar attempts in other countries to frame an exhaustive code noted that such attempts either proved futile or resulted in the mere enumeration of some basic principles in general terms. Although it has stopped short of laying down the comprehensive code of conduct, it has issued guidelines or declarations of principle on various issues which define the limits of acceptable behaviour in these important areas. These along with the principles evolved in the course of adjudication will compensate the lack of a rigid and comprehensive code of journalistic ethics. The Council appears to be satisfied with this performance

². Report of the First Press Commission (1954), p. 514.

³. Sec 12(2) of the Press Council Act 1965 reads: The Council may, in furtherance of its object, perform the following functions, namely:

(a) x x x

(b) to build up a code of conduct for newspapers and journalists in accordance with high professional standards.

when in its eighth Annual Report (1973) it noted that "in the course of eight years of its functioning, the Council has already built up a fairly sizeable case law to serve as codes in the areas dealt with in the course of its adjudications"⁴.

6.4 In this exercise, the Indian Press Council was emulating the British Press Council which was in favour of evolving a code rather than write it down rigidly. Britain does not have a written constitution; nor do they have a written common law. A declaration on the principles of the Press Council of Britain recognised the advantage of an unwritten code because, just like an unwritten constitution, a flexible code could be easily adapted to the changing circumstances.

6.5 Although the British Press Council always resisted the idea of a comprehensive code of conduct for journalists, it targeted certain specific areas of journalistic activity for the issuance of Declarations of Principle. These take the form of 'mini-codes,' lists of dos and don'ts relating to defined subjects. At present there are three such subjects: privacy, payments (i.e. chequebook journalism) and financial journalism. These Declarations are among the few written guidelines on

⁴. Supra, n. 1, p. 95.

ethical standards in journalism, and contravening them might lead to a condemnation from the Council.⁵ As pointed out by Lord Devlin, it has, whether it realised it or not, adopted the methods of generations of judges who produced the common law of England. They let it grow out of the decisions they gave.⁶

6.6 Apart from the framing of the 1968 guidelines for avoidance of objectionable communal writing⁷ and the formulation of a code of conduct for the duration of the national emergency declared in the wake of the Indo-Pak war of 1971, the Indian Press Council has repeatedly decided against straightaway putting down a general code of conduct for the press. Conforming to this stand, Justice A N Sen, a former Chairman of the Council, says:

A question had often been raised as to whether the Council should lay down a code of conduct for the journalists. The consistent view of the Council has been that it will not be proper to lay down any code of conduct. I am in entire agreement with this view. I feel that defining a code of conduct in clear terms may be

⁵. Tom G Crone, Law and the Media, (Oxford: Heinemann Professional Publishing, 1989), pp 177-78.

⁶. H Phillip Levy, The Press Council: History, Procedure and Cases, (London: Macmillan, 1967), p. xi.

⁷. See 1969 Ann. Rep. 99 for Guidelines on Communal Writings issued by the Press Council in November 1968. More details in infra ch. 14.5, p. 286.

impracticable and in my view seeking to lay down the code of conduct which must necessarily be in broad and general terms may have the effect of interference with the freedom of the press. The Council, however, through its various decisions has been laying down the norms of journalistic ethics and propriety.²

6.7 Though both the 1965 and 1978 Acts establishing the Press Council spoke of 'building up' a code, the Government always wanted that it should be 'framed'. The non-framing of the code was a convenient alibi for abolishing the Council during the internal emergency. The Information and Broadcasting Ministry's annual report for 1975-76 stated:

The Press Council during the nine years of its existence had failed to curb the tendentious, provocative and unrestrained writings in the press. It was unable to frame a code of conduct for editors and complaints of minor character mostly engaged its attention. Accordingly the Press Council of India was abolished with effect from 1st January 1976.

6.8 During the interregnum, a futile attempt was made by the Government to prepare a code with the connivance of a section of editors. A code drafted by a committee of such editors was presented in the Rajya

². Chairman's Foreword, 1986 Annual Report 2.

Sabha on 8 January 1976. Those henchmen, however, made a sudden volte-face after the emergency; some of them opposing even the building up of a code by the Press Council.

6.9 The new Council set up under the 1978 Act considered the question afresh in 1980. A discussion was set in motion on the usefulness of building up, in the course of time, a body of case law based on adjudications and also on the proposal to frame principles with regard to the protection of the right of privacy of the citizen, communal and casteist writings, right to reply and right to correction. The overwhelming opinion was against the formulation of any such principles by the Council and the proposal was shelved.

6.10 The Government was not prepared to leave the matter as such. On 24 August 1982, the Ministry of Information and Broadcasting wrote to the Council asking it to prepare a code of conduct in terms of Sec 13(2)(b) of the Act so that it will be possible to establish an offence against the standards of journalistic ethics, professional conduct or public taste. In view of the limited leeway provided by the statute and taking into account the recommendation of the Second Press

Commission,⁹ the Council was of the opinion that while such a code could never be exhaustive it would be more appropriate to build up an acceptable code gradually on the basis of the principles of case law gathered from the adjudications rendered by it from time to time. For this purpose, the Council decided to prepare and publish a compendium on the case-law built up by it so far on the basis of its adjudications.¹⁰ It is gratifying to note that the Third International Conference on Press Councils and Similar Bodies held in New Delhi in October 1992 recommended to other press councils to emulate the Indian pattern.

6.11 Though a written code has the advantage of serving as a ready guide for the journalists as well as

⁹. Report of the Second Press Commission (1982), Vol. 1, paras 27, 32.

¹⁰. Accordingly, a compendium entitled Violation of Journalistic Ethics and Public Taste was brought out by the Council in 1984 in collaboration with the Indian Law Institute based on the decisions rendered under section 14 of the Act. A similar digest prepared on the basis of adjudications falling under section 13 was brought out in 1986 under the title Violation of Freedom of the Press. Law of Defamation: Some Aspects is an excellent monograph published in 1986. Another document A Guide to Journalistic Ethics was also brought out by the Council, containing guidelines sorted out from its adjudications, in an effort to build up a code of conduct. Apart from this, the Council is bringing out an Annual Report and Quarterly Review. An annual index of adjudications and the principles enunciated therein is also published. The annual reports of the British Press Council are entitled The Press and the People.

the authorities, its disadvantages far outweigh the advantages. It can conveniently be used as a tool to coerce the journalists and they can easily be hauled up citing a violation. Journalism is not a closed profession and the imposition of a code of conduct on the analogy of other professional bodies will hamper the cherished freedom of expression. As the Editors' Guild of India pointed out "responsible people cannot be governed by formal codes". The National Union of Journalists (India) adopted the Agra Declaration in 1981 which is described as the credo of journalists.¹¹ The All-India newspaper Editors' Conference adopted a code of ethics for editors in the early fifties and revised it in 1983.¹² It is needless to say that a voluntary code of conduct is most desirable. As advised by Justice Sen, an editor may conveniently set down certain norms and standards to be followed by his newspaper:

It may be the duty of the editor to lay down such norms as functioning within the norms is expected to be smooth and not to result in any kind of misuse of the freedom of the press.¹³

¹¹. See Appendix

¹². See Appendix

¹³. Speech delivered by Justice A N Sen, the then Chairman of the PCI, on 25 October 1986 at the Editors' Conference organised by the Haryana unit of the All-India Small and Medium Newspapers' Federation. For full text, see 1987(2) PCI Review 1.

6.12 But times are changing and the need for a code of ethics is increasingly felt at least in certain areas of journalism. Participating in a seminar on the role of the media in investor protection, Mr Justice P B Sawant, chairman of the Press Council, stated that the Council was contemplating formulation of a code of ethics for financial journalists as it found the existing code inadequate to cover several aspects of business journalism.¹⁴ A committee appointed by the Securities and Exchange Board of India (SEBI) under the chairmanship of Mr Y H Malegam to suggest disclosure norms for offer documents in capital issues had also recommended a code of conduct for financial journalists. As the press is in a position to control the economy and manipulate the market, a code of conduct is absolutely necessary to safeguard the interests of the growing lower middle class investors.

¹⁴. The Times of India, Bombay, 4 December 1995.

Part Two

ISSUES, PROBLEMS
AND SOLUTIONS

Chapter 7

THE PRESS AND PARLIAMENT

All are involved in a Parliament.

John Selden¹

7.1 The dichotomy between legislative privileges and freedom of the press presents an interesting panorama of paranoiac confrontations and unresolved conflicts. If freedom of the press is the ark of the covenant of democracy,² the essence of parliamentary democracy is a free, frank and fearless discussion in parliament. The rule of freedom of speech and debate in Parliament became established in England in the 17th century in the famous case of Sir John Eliot, followed by a declaration in the Bill of Rights in 1688 that the freedom of speech and debate on proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. In India, this freedom is expressly safeguarded by Cls (1) and (2) of Art 105 (in the case

¹. Tabletalk, 1689, 'Parliament'.

². Bennett Coleman & Co v. Union of India, A.I.R. 1973 S.C. 106.

of the State legislature, by Art 194) of the Constitution. It is this freedom which is in direct conflict with a newspaper's right to publish and inform the public.

7.2 When the Constitution of independent India was adopted in 1950, it was provided that so long as Parliament did not enact any law of its own, its privileges would be the same as those of the British House of Commons, including the inherent power to punish for contempt or breach of its privileges. Apart from a cosmetic change for the purpose of a sentimental omission of the reference to the "House of Commons of the United Kingdom," the 42nd as well as the 44th Constitution amendments did not effect any departure from the position prevailing on 26 January 1950. Therefore, whenever a question arose as to whether any privilege of a legislative house had been infringed by a newspaper, invariably it becomes necessary to make a reference either to the bewildering mass of English precedents or to May's Parliamentary Practice to understand the position, practice and precedent obtaining in the House of Commons. The privileges exist to enable members to carry out their work and the object is to safeguard the dignity of each House, allowing members to perform their

duties without fear or favour.² In the United Kingdom, a review of this branch of the law was undertaken by the Select Committee of the House of Commons in 1966-67.

7.3 A journalist may encounter the law of Parliament in various ways:

(i) By violating any of the privileges of Parliament, e.g. - relating to publication of its proceedings.

(ii) By violating any of the Rules of Procedure made by a House of the Legislature, in exercise of the power conferred by Arts 118 and 208 of the Constitution, e.g. - relating to admission and withdrawal of strangers.

(iii) By publishing comments or any other statement which undermines the dignity of the House or the confidence of the public in the legislature, and are, accordingly, punishable by Parliament as 'contempt of parliament', which is analogous to the power of a court of record to punish for 'contempt of court'.

7.4 However, like judges, members of parliament are nowadays more resilient and accustomed to strident criticism than they used to be. It is highly unlikely that robust but honest attacks in the media on parliament

². Robin Callender Smith, Press Law (1978), pp 259-60.

or its members would lead to findings of contempt - although action might easily be taken over reports which seem to be malicious.

7.5 Two instances can be cited to illuminate this point: When Arun Shourie, executive editor, wrote an article in Indian Express on 4 September 1981 under the title "Pretty Little Lies in Parliament," commenting on the Finance Minister's statement in both houses of Parliament on the issue of association of the Prime Minister, Mrs Indira Gandhi, with a trust floated by A R Antulay, the then Chief Minister of Maharashtra, permission to move a motion of breach of privilege was refused on the ground that "it is not consistent with the dignity of the house to take notice of every case which may technically appear to constitute a breach of privilege".⁴ The Chairman of the Rajya Sabha observed on this aspect of the matter:

As regards Shri Arun Shourie, I do not think this is a proper case for action. Newspapers always look into things closely and critically. They must, however, ascertain the facts better. Although the item is phrased in language which is not high-toned or polite, I am going to ignore it. Arun Shourie was doing a journalistic duty according to his lights.

⁴. Lok Sabha Proceedings, XXVI Priv. Digest, No. 2, p.8 (1981).

I have said before that the newspapers are the eyes and ears of the public and if every citizen has a right to criticise the actions of others, so also the newspapers whose profession is to turn the light of publicity on the irregularities of public actions.⁵

7.6 Earlier in 1967, S Mulgaokar, editor-in-chief of the Hindustan Times, was held guilty of a breach of privilege and contempt of the house for using the term 'Star Chamber' with reference to Parliament. Mulgaokar did not express regrets; but the committee of privileges took a liberal view. It took note of the disclaimer on the part of the editor that he had any intention to bring the institution of parliament into disrepute and contempt. While the committee felt that he should have unhesitatingly and gracefully expressed an unconditional and unqualified regret, nevertheless, in the totality of the circumstances, it felt it better to ignore the matter "as that would add to the dignity of the house". It was further observed:

The Committee feel that the penal powers of the House for breach of privilege or contempt of the House should be exercised only in extreme cases where a deliberate attempt is made to bring the institution of Parliament into disrespect and undermine public confidence in

⁵. Rajya Sabha Proceedings, XXVI Priv. Digest, No. 2, pp 18, 21 (1981).

and support of Parliament.⁶

7.7 These two instances clearly reflect the mature wisdom of a Parliament which on an earlier occasion had condemned R. K. Karanjia, editor of Blitz, for publishing adverse and derogatory comments on J. B. Kripalani for his speech in the Lok Sabha during the defence debate. When the editor was called to the bar of the House and reprimanded, it was the first such instance in the history of our Parliament.

7.8 The penal power of Parliament hanging like a Democles' sword in the slender thread of discretion is not conducive to a free press. As regards the plea of justification put up by Karanjia that the comments in question amounted to fair comment, the Committee of Privileges said:

Nobody would deny the press, or as a matter of fact any citizen, the right of fair comment. But if the comments contain personal attacks on individual members of parliament on account of their conduct in parliament or if the language of the comments is vulgar or abusive, they cannot be deemed to come within the bounds of fair comment or justifiable criticism.⁷

7.9 Despite the grace and indulgence shown by Parliament in the case of Arun Shourie, the Andhra

⁶. XIII Priv. Digest, No.1, pp 3-6 (1968).

⁷. V Priv. Dig., No.2, pp 28-36 (1961).

Pradesh Legislative Council preferred to remain adamant in getting Ramoji Rao, Chief Editor of Eenadu, before the bar of the House for admonishing him on the charge that he had committed a breach of privilege and contempt of the House by commenting in the daily on 9 March 1983 on the proceedings of the Council under the headline 'Peddalu Golaba' (elders' commotion). The intervention of the Supreme Court further infuriated the Council and the rapid developments were reminiscent of the conflict of the legislature and the judiciary in the Keshav Singh case.⁸ Though at one point of time it appeared that it would lead to a major constitutional crisis, it was avoided by the tactful handling of the situation by the Chief Minister, N T Rama Rao, who advised the Governor to prorogue the Council on 30 March 1984.⁹ Again it was 'privilege' which served as the atrocious cover for the Tamil Nadu Legislative Assembly sending to jail, in April 1987, the editor of Ananda Vikatan for daring to publish a cartoon which did not even name specific legislators or insinuate identities.

7.10 The experience of the exercise of legislative privileges by the legislatures in India until now will

⁸. In re Under Article 143 of the Constitution of India, A.I.R. 1965 S.C. 745.

⁹. See, M P Jain, Parliamentary Privileges and the Press (Bombay: N M Tripathi, 1984), pp 113-114.

show that it is neither expedient nor advisable to confer such absolute powers on them. After a review of the privilege cases handled by the various legislatures, the First Press Commission reported in 1954 that some of the cases disclose "over-sensitiveness on the part of the legislatures to even honest criticism". The Commission went on to observe:

The press, as a whole, is anxious to maintain and enhance the dignity and prestige of our courts and legislatures and recognises that within the precincts of the Assembly hall the presiding officer's ruling is supreme and the freedom of the members absolute. It is, therefore, all the more necessary that the legislatures should respect the freedom of expression where it is exercised by the press within the limits permitted by law, without imposing additional restrictions in the form of breach of privileges unless such restrictions are absolutely necessary to enable them to perform their undoubtedly responsible duties. No one disputes that parliament and state legislatures must have certain privileges and the means of safeguarding them so that they may discharge their functions properly but like all prerogatives the privilege requires to be most jealously guarded and very cautiously exercised. Indiscriminate use is likely to defeat its own purpose. The fact that there is no legal remedy against at least some of the punishments imposed by the legislature should make them all the more careful in exercising their powers, privileges

and immunities.¹⁰

7.11 Though 1954 was too early an year to make a comprehensive assessment and objective evaluation, it is pertinent to note an important suggestion made by the Press Commission:

It would therefore be desirable that both Parliament and state legislatures should define by legislation the precise powers, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them ... Articles 105 and 194 do contemplate enactment of such a legislation and it is only during the intervening period that Parliament and state legislatures have been endowed with the powers, privileges and immunities of the House of Commons.¹¹

7.12 Reiterating this suggestion, the Second Press Commission said:

We think that from the point of view of freedom of the press it is essential that the privileges of parliament and state legislatures should be codified as early as possible.¹²

7.13 The intention of the framers of the Constitution was that sooner than later the legislatures should frame their own

¹⁰. Report of the First Press Commission (1954), p. 430.

¹¹. Ibid, p. 421.

¹². Report of the Second Press Commission, Vol 1, p. 53 (1982).

laws and it was only as an interim measure that they were given the privileges of the House of Commons.¹³ When Article 105(3) came up for consideration before the Constituent Assembly on 19 May 1949, there was strong criticism against the reference to the privileges of the House of Commons and on behalf of the Drafting Committee, Sir Alladi Krishnaswamy Ayyar said: "If you have the time and if you have the leisure to formulate all the privileges in a compendious form, it will be well and good". He assured the House that "only as a temporary measure, the privileges of the House of Commons are made applicable to this House". This assurance was reiterated by the President of the Constituent Assembly, Dr Rajendra Prasad, when he said on 16 October 1949:

The Parliament will define the powers and privileges, but until the Parliament has undertaken the legislation and passes it the privileges and powers of the House of Commons will apply. So, it is only a temporary affair. Of course the Parliament may never legislate on that point and it is therefore for the members to be vigilant.¹⁴

7.14 That apprehension became prophetic because

¹³. Subba Rao, J., in Searchlight I, A.I.R. 1959 S.C. 395 at 417, expressly characterised the second part of Art 194(3) as "a transitory measure".

¹⁴. As quoted by Ramakrishna Hegde in his introduction to The Karnataka Bills, published by the Government of Karnataka, 1988.

Parliament never legislated and what was intended to be "a temporary affair" has lasted for more than four decades, the only exception being the futile attempt of Ramakrishna Hegde to codify the privileges, define the offences and prescribe the punishment by introducing the Karnataka Legislature (Powers, Privileges and Immunities) Bill in 1988 during his tenure as Chief Minister of Karnataka.¹⁵

7.15 It is significant that the Press Council, distressed by this nebulous state of affairs, took up "a study of the question of parliamentary privileges vis-a-vis the press" as soon as it came into being in 1966. In chapter 2 of the second Annual Report (1967), the Council published the results of the study and strongly recommended codification. It said:

The Press Council is convinced that the present undefined state of the law of privileges has placed the press in an unenviable position in the matter of comments on the proceedings of Parliament.

7.16 The undefined boundary of parliamentary privileges which Justice Subba Rao described as 'nebulous'¹⁶ has been a cause of chronic uneasiness for the press. In the absence of a

¹⁵. For full text of the bill, see The Karnataka Bills, published by the Government of Karnataka, 1988.

¹⁶. Supra n. 13 at p. 419.

precise and unambiguous code, parliamentary correspondents and commentators are scared of treading, albeit unwillingly, on what is often described as 'privileged corns'. In order to get insulated from this latent danger, they may try to tone down their comments which is detriment to the genuine interests of both the press and the legislature.

7.17 It is this danger which prompted the Press Council to repeat in 1982 what it said 15 years ago:

The Council reiterates its view that the privileges of Parliament and State legislatures should be codified in the interest of the freedom of the press.¹⁷

7.18 This aspect was highlighted by Justice A N Sen, Chairman of the Press Council, at Ahmedabad on 20 January 1987 when he said:

The major constraint on the freedom of the press, as I see it, is the lack of proper and necessary recognition of the right to information by the press ...I am also of the opinion that the privileges of the legislature should be codified to throw sufficient light on what may be considered to be

¹⁷. Recommendations of the Press Council, finalised at its meeting of 28 December 1982. For full text of the recommendations, see supra n. 9 pp 121-23.

acts of contempt and the area of contempt should be clearly demarcated and identified.

7.19 The Supreme Court in M S M Sharma v. S K Sinha¹⁸ observed that if Parliament or a State legislature enacted a law under Articles 105(3) or 194(3) of the Constitution, defining its privileges, that law would be subject to Article 19(1)(a) and could be struck down if it violated or abridged any of the fundamental rights, unless that law could be validly saved under clause (2) of Article 19. As pointed out by Justice A N Grover, a former Chairman of the Press Council, the houses of Parliament or the State legislatures would be most reluctant to codify legislative privileges in view of this constitutional position.¹⁹

7.20 When a spate of rulings in the Tamil Nadu Assembly came down heavily on the print medium and the editor of the Illustrated Weekly of India was summoned on 20 April 1992 to be reprimanded for an article carried by the weekly sometime in 1991, the Press Council issued a press release on 2 May 1992 reminding all concerned the important recommendations made by it on parliamentary

¹⁸. A.I.R. 1959 S.C. 395.

¹⁹. Supra note 9, Foreword.

privileges and freedom of the press in the study conducted in collaboration with the Indian Law Institute way back in 1982.²⁰ Describing the conflict as one between a House and a citizen, the Council reiterated its demand for the preparation of an informal code of privileges by a body appointed by the Parliament and the State legislatures.²¹

7.21 The Committee of Privileges of the Lok Sabha which examined the issue in the light of the developments in Tamil Nadu has since summarily rejected the demand for codification of privileges.²² Allaying apprehensions that the

²⁰. While approaching the Press Council, the editor, Anil Dharkar, stressed on two points: (a) he was not the editor of the publication at the relevant time; (2) he was not and never has been the publisher of the magazine as stated by the Speaker. The Council was unable to help him as he had also moved the Supreme Court in the matter and the Council is debarred from taking up any matter which may be sub judice. However, the explanation provided by him was accepted by the Tamil Nadu Assembly and privilege motion against him was dropped. Consequently the Supreme Court dismissed the petition. For recommendations of the Council, see supra n. 17.

²¹. The PCI Review, 3/1992, pp 1-3.

²². The fourth report of the Committee of Privileges received approval of the Speaker on 5 August 1994 and was tabled in the Lok Sabha on 19 December 1994. Following the conference of presiding officers in New Delhi in September 1992, the Lok Sabha Secretariat, however, issued a document which is a compilation of rulings, House committee reports, established parliamentary practices, rules of conduct and conventions of Lok Sabha. The document will help the journalists as well as the

unfettered power to punish posed a threat to freedom, the Committee pointed out on the basis of a detailed study of privilege cases that have arisen in the Lok Sabha since 1952 that the House has used the power "extremely rarely". Barring cases of contempt of the House where visitors created disturbances by shouting slogans or throwing leaflets from the visitors gallery, there has only been one instance in the Lok Sabha since 1952 when a person was sent to jail for having committed breach of privilege and contempt of the House. The contemner was Smt Indira Gandhi, former Prime Minister. She was expelled from the post-emergency Parliament and was sentenced to imprisonment which ended with the prorogation of the House a week later.

7.22 A study of the pattern of disposal of privilege notices since 1980 revealed that out of the hundreds of notices received each year only a tiny fraction reached the Committee stage with the

public and the harassed officials to know what are not privileges. For instance, misbehaviour of a member is not a privilege. Though this exclusionary list lacks statutory force, yet it is expected to have a persuasive effect on the legislators as well as reporters to self-regulate their conduct along the path of professional rectitude. As pointed out in the 14th Annual Report (1992-93) of the Press Council, it is a step in the right direction.

majority being disallowed either at the threshold or through a ruling by the Speaker in the House. In 1981, out of 246 notices of question of privilege received in the Lok Sabha secretariat, 226 were disallowed at the threshold, 17 were disallowed by the Speaker through a ruling given in the House and only two were referred to the Committee of Privileges. In 1991, out of 100 notices received 99 were disallowed at the threshold and only one notice was referred to the Committee of Privileges. In 1992, however, all the 122 notices received were disallowed at the threshold.²³

7.23 These figures will justify the assertion of the Committee that the misuse and abuse of privileges is only a myth. However, the Committee does not cite any study relating to the abuse of privileges in different legislatures. For instance, while it approvingly quotes the restraint shown by the Lok Sabha, the Committee has nothing to say about the actions of the legislature in Tamil Nadu from where the issue arose in the first place. The panel noted that absence of codification was not responsible for confrontation between the legislature and the judiciary. But what is the difficulty in codifying the privileges? The answer in the words of the Committee is: "If codified, parliamentary privileges will become subject to fundamental rights enshrined in the

²³. Report of the Lok Sabha's Committee of Privileges tabled in the Lok Sabha on 19 December 1994. (as reported in The Hindu on 30 December 1994.)

Constitution and they will come within the ambit of judicial scrutiny and determination." There lies the crux of the matter.

7.24 Apart from the vexed question of codification, it is time to deliberate on whether a legislative house should enjoy privileges and wield penal powers for the conduct of its business and maintenance of its authority. It will be expedient if legislative privileges were confined for the purpose of dealing with encroachers, detractors and obstructors. The entire idea of a person committing a breach of privilege by making a comment or writing a report in a newspaper should be discarded as obnoxious. The American process of government, based on free and uninhibited discussion, is a shining example worthy of examination in this context. The power of the U.S. Congress to punish for contempt is subject to judicial review; but it does not in any way belittle the authority of the House or hamper its functioning. The scope of legislative privileges in the United States is extremely limited and scope of judicial review much broader than in the United Kingdom.²⁴ If a press commentator, in the legitimate exercise of his right to freedom of speech, abuses or defames a legislature or a

²⁴. See Kilbourn v. Thompson, 103 U.S. 168 (1881) and Marshall v. Gordon, 243 U.S. 521 (1916).

legislator, the remedy ought to be sought in a court of law. Such a contraction in the area of legislative privileges in favour of freedom of speech will definitely enhance the prestige and dignity of the legislature. The preamble to the paramount parchment of the people (our Constitution) fulfils itself, as pointed out by Justice V R Krishna Iyer and Dr Vinod Sethi, in such an atmosphere of light, thought and speech.²⁵

²⁵. V R Krishna Iyer and Vinod Sethi, "Parliamentary Privileges: An Indian Odyssey," (New Delhi: Capital Foundation Society, 1995), p. 147.

CHAPTER 8
CONTEMPT OF COURT

8.1 Of all the risks a journalist faces in the day-to-day presentation of news and views the one about which he or she is likely to exercise most care is contempt of court. The punishment for publishing a contempt can be swift and severe; grave contempts can result in imprisonment of the editor or journalist; and there are numerous examples of the courts imposing fines for lesser contempts.

8.2 There was no codified law of contempt till the Contempt of Courts Act was passed in 1926. It was replaced by the Contempt of Courts Act 1952. After a few years' working of the 1952 Act, it became obvious that the law relating to contempt was unsatisfactory and needed changes in view of the pronouncements of the Supreme Court. One departmental¹ and one parliamentary committee² examined the matter at length. On the basis

¹. The Sanyal Committee Report, 1963.

². The Bhargava Committee Report, 1968.

of these reports, the Contempt of Courts Bill, 1968 was presented in Parliament, harmonising as far as possible the interests of the individual in the freedom of expression and the interests of the administration of justice within the framework of the Constitution. The Bill was eventually passed as the Contempt of Courts Act, 1971, "to define and limit the powers of certain courts in punishing contempts of courts and to regulate their procedure".

8.3 The Press Council of India undertook an exhaustive examination of the law relating to contempt of courts on the basis of the 1968 Bill and observed thus:²

One might be forgiven for the feeling that the law in this (press vis-a-vis judiciary) respect has not been quite fair to the need of the freedom which the Press must enjoy, due in great part to unnecessary oversensitiveness on the part of the courts and the judges as regards their dignity. Besides, it is acknowledged on all hands that the Press is greatly handicapped by the contours of the law in this regard being vague and undefined such that it leads to timorousness on its part when dealing with the conduct of judges or their decisions, or commenting on matters of public interest, which is far from healthy.

². 1969 Ann. Rep. 107-108.

The Press Council is greatly concerned at this state of the law and earnestly desires that this condition of uncertainty in the law should be ended by properly framed legislation which would, at the same time, safeguard the freedom of the Press and the prestige and dignity of the judiciary, while ensuring the orderly progress of the judicial process of the adjudication of cases.

8.4 Articles 129 and 215 of the Constitution make the Supreme Court and the High Courts respectively 'Courts of Record' with power to punish for contempt. Apart from this, the Constitution permits reasonable restrictions on the guaranteed right of freedom of speech and expression in the interests of, inter alia, contempt of court.

8.5 Neither the Act of 1926 nor of 1952 provided any definition of 'contempt of court,' and it was held that the legislature considered it unnecessary to define it as the term had already gained a definite meaning ascribed to it by judicial pronouncements of English and Indian courts.⁴ The Act of 1971, for the first time, gave a complete definition of the expression, by codifying the results of judicial decisions, in cls (a) to (c) of section 2. Accordingly, "contempt of court" consists of two categories: civil and criminal. Civil contempt is

⁴. L.R. v. Das Gupta, A.I.R. 1954 Pat. 204.

defined in cl (b); briefly speaking, it may be said to be 'contempt in procedure,' committed by disobeying judicial decrees, orders and the like. Criminal contempt is defined in cl (c). It means the publication of any matter or the doing of any other act which

- (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

8.6 The Press Council was not happy with this definition. It declared that "the Bill did not deal with the important and vital question of what constitutes the contempt of by what is termed "scandalising the court," but leaves it subject to the same undefined rules dependent on the uncertainty consequent on the predilection of individual judges and courts as at present. This is not satisfactory and the Council would urge the enactment of legislation which would balance the functioning of a free Press with the maintenance of

public confidence in the independence, impartiality and integrity of the judiciary."⁵ The Council considered that innocent writings without intent to interfere with the course of proceedings in a court should not attract the penal consequences. The Council rejected the orthodox view found in the Bill that since it was difficult to prove intention, the mischief done, whether intended or not, deserved to be punished. It then offered suggestions for improvement in various clauses of the Bill. One suggestion was that as in the case of criminal contempt committed in the face of a judge, in cases of contempt arising out of attacks on the impartiality or integrity of a judge also, the proceedings should be heard by other judges of the court. In cases where the attack was on the entire body of judges of a High Court, the case should be directed to be heard by the Supreme Court.⁶

8.7 Newspapers are often charged with the criminal contempt of scandalising the courts. Apart from highlighting any basic problem in relation to the press and the law of contempt, most of the scandalising cases either involve disgruntled litigants attacking the judges or the newspapers publishing unverified market place gossips about judges. The language used in many of these

⁵. Supra note 3. p.108.

⁶. Ibid, p. 123

newspaper stories often expressed the frustrations of the authors. Justice Masodkar recounted this in a case when he accepted the apology of one such writer and remarked that the latter's

[E]xpressions, ... merely indicate coloured flare of language and which may have origin in an injured state of mind and as such unhealthy expression of personal sense of frustration though tantamount to contempt, would not by itself be the ground to take any serious view of the matter. [He] ... has submitted unqualified apologies and we have nothing to doubt his bona fides. Looking to the background of his case and his personal frustration as a writer, he has overstepped in expression. Matters of expression are personal in nature. Much depends on the training and culture of the maker. What may appear to a sophisticated mind as harsh, rough, rude and uncouth may not be so to unsophisticated and even to angry, irritated and brooding. There is nothing before us to hold that the opponent was actuated by desire to disrupt nor we are sure about his ability to express what he feels just or unjust ...⁷

8.8 This indulgence, congruent with the spirit of the Constitution, is very near to the American approach where in a similar situation the judges will ask the

⁷. B G Ghate v. P S Raohute, (1977) Cr L J 1490, p. 1491.

question: is there a clear and present danger that the administration of justice will be affected?^e Since a 'clear and present danger' cannot really be shown in a large number of cases, the law of contempt does not really act as a check on comments made by the press. The American courts do not depend on contempt of court to ensure a fair trial of issues. The American procedure allows other methods and techniques in order to secure a fair trial; and American judges are not unduly perturbed by adverse newspaper comments.

8.9 Even in England the rigid doctrinaire approach is slowly fading away with the passing of the Contempt of Court Act 1981. Section 2(2) of the Act states that the strict liability rule will only apply to those publications which create a substantial risk of serious prejudice to the course of justice in the relevant proceedings. The relevant test for contempt is: Is there a substantial risk of serious prejudice? The courts have made it clear that it is a double test - the risk must be substantial and the likely prejudice has to be serious. In the words of Lord Chief Justice Lane:

A slight or trivial risk of serious prejudice

^e. Bridges v. California and Time-Mirror Co. v. California, (1940) 314 U.S. 252; Fennekamp v. Florida, (1945) 328 U.S. 331.

was not enough nor was a substantial risk of slight prejudice.⁹

B.10 Indian courts, true to the old English approach, display a tendency to frown upon any kind of comment on a matter which is pending before a court or where it is imminent that a cause or matter may come before the courts. Besides, the courts frequently punish people who say or do things which, in the opinion of the judges, lower the dignity of the court. The line between comment which scandalises the judges and comment which is legitimate criticism is not always easy to draw. No clear statement on the limits of permissible discussion emerged even though the Delhi High Court judgments in the Congress Party (1971) and Supersession of Judges (1974) cases insisted on the right of the public to discuss matters of public importance even if such matters were pending determination before the courts.¹⁰ Apart from the Avadh Bar case,¹¹ the Supreme Court did not get an opportunity to deal with any case under the 1971 Act till 1978. In the wake of the great controversy surrounding the appointment of the Chief Justice of India, the Times of India carried a news item in which a group of Bombay

⁹. Attorney General v. Times Newspapers (1983)

¹⁰. Dioviyaya Narain Singh v. A. K. Sen, (1971) 1 Delhi 14 (Congress Party case); Anil Kumar Gupta v. K. Subba Rao, (1974) Delhi 1 (Supersession case).

¹¹. B. N. Verma v. Harroobind Dayal, A.I.R. 1975 All. 52.

lawyers accused the judges who had decided the Habeas Corpus case during the emergency of behaving in a cowardly manner. Chief Justice Beg explained and defended the judgment in that case and took the view that the newspaper should be held guilty of contempt.¹² Unfortunately, the majority did not deal with the case and simply disposed of the matter on the basis "that it is not a fit case where a formal proceeding should be drawn up". In the companion Indian Express case¹³, though Justice Krishna Iyer had written a long inconclusive essay laying down certain guidelines in such cases, which was self-confessedly obiter dicta, it is not clear as to whether he prefers the test as to whether there should be a clear and present danger or whether one should look at the motive of the contemner or the overall social effect or all of these things. Though in the Supersession case, the Delhi High Court insisted on the right of the public to discuss matters of public importance, there is no complete discussion on how this right is recognised by the law of contempt of court.

8.11 It was in this context that the Press Council, in association with the Indian Law Institute, undertook a comprehensive study and made important recommendations

¹². In re Sham Lal, A.I.R. 1978 S.C. 489.

¹³. In re Mulgaokar, A.I.R. 1978 S.C. 727.

for amending various sections of the 1971 Act in 1982. With a firm view that truth or bona fide belief that the subject matter of the publication is true should constitute a defence, the Council recommended the following as a new provision in section 5:

Publication of any statement which is true or which the maker in good faith believes to be true shall not constitute criminal contempt provided the making of the statement is not accompanied by publicity which is excessive in the circumstances of the case.

At the same time a proper safeguard is necessary and with this in mind, the Council further suggested that the following may be added as a proviso to section 12:

Provided that if the contemnor pleads truth or bona fide belief in truth as a defence and the court finds that the defence is false the contemner shall be punished with rigorous imprisonment for a period of six months and fine or both.

This is meant as a deterrent to those who may be tempted to falsely or maliciously make allegations which may ultimately be found to be concocted and baseless. It was with this view that the Council further suggested the addition of the following as a definition clause under section 2(cc):

Nothing is done in good faith unless it is done with due care and caution.

8.12 Dr Rajeev Dhavan, while preparing the investigative study on contempt of court,¹⁴ suggested that the punishment for scandalising the courts should be abolished. However, in his Foreword to the study, Justice A N Grover, the then Chairman of the Press Council, cautioned that the conditions obtaining in our country must not be overlooked. He said:

Once the door is laid open to level all kinds of allegations which may even be prompted by disgruntled litigants to malign the judges, there will be serious danger not only of blackmail but also of irresponsible character assassination which will bring the judiciary and the judicial system into contempt and ridicule. It is not expedient to draw inspiration from the position in the United States of America or even in the United Kingdom for the simple reason that the law of torts is very highly developed in those countries and is frequently resorted to. Moreover the damages which are awarded in case of defamation are so heavy that people are mortally afraid of making false allegations. It is not so in our country. The tortuous course which a suit for defamation generally follows and the years that it is likely to take before it is finally decided by the highest court are well known with the result that everyone is greatly

¹⁴. Rajeev Dhavan, Contempt of Court and the Press (1982).

discouraged from launching such proceedings.¹⁵

8.13 Though the Press Council is in agreement with the demand of journalists and lawyers that the plea of justification should be allowed to be pleaded in contempt cases, it is to be noted that the Phillimore Committee in England was not prepared to accept that 'truth' should by itself be made a defence where a judge is scandalised.¹⁶ However, the working paper of the Canadian Law Commission took the view that 'truth' could be pleaded in a contempt trial that took place in the normal course and not as a result of a summary procedure.¹⁷

8.14 The law of contempt, intended to insulate the judiciary from insult, requires a drastic overhaul in the interests of freedom of speech and expression. The press, wary of the danger, may leave the courts untouched. Though fair and reasonable criticism of a judicial act in the interest of the public good does not amount to

¹⁵. Ibid, p. vi.

¹⁶. Phillimore Committee Report on Contempt of Courts (1974) Cmnd. 5794, paras. 165-66, pp. 70-71.

¹⁷. Law reform Commission, Criminal Law: Contempt of Court: Offences against the Administration of Justice (1977) Working Paper No. 20, p. 61.

contempt,¹⁸ many a newspaper will not dare to venture into that dangerous arena. While s. 4 of the Act protects fair and accurate reporting of judicial proceedings, s. 5 protects fair criticism of a judicial decision because the public has an interest in the proper administration of justice. This provision is an exception to the class of contempt by 'scandalisation' of a court as mentioned in s. 2(c)(i), and is founded on the principle stated in Gray's case as follows:

Judges and court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no court could or would treat that as contempt of court.¹⁹

In short, the immunity on the ground of 'fair comment' is an adjustment between the public interest in freedom of expression and the public interest in the free flow of justice. The principle behind this exception to liability for contempt of court and its ambit was expressed by Lord Atkin as:

... no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration

¹⁸. R v. Gray, (1900) 2 Q.B. 36.

¹⁹. ibid.

of justice.²⁰

8.15 In the context of the foregoing analysis, it will be worthwhile to recall the view taken by the Press Commission of India in 1954:

The Indian press as a whole has been anxious to uphold the dignity of courts and the offences committed more out of ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. [I]nstances where it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised are extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts.²¹

8.16 Times have changed; and along with it the views on the subject. "Justice," as observed by Lord Atkin, "is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."²²

²⁰. Ambard v. A.G. of Trinidad, A.I.R. 1936 P.C. 141.

²¹. Report of the Press Commission of India (1954).

²². *Supra* note 20.

CHAPTER 9
JOURNALISTS' SOURCES

9.1 Of all the valuable commodities cherished and jealously guarded by journalists, a long contact list of reliable sources is the foremost. Every reporter has his own contact list which has usually been in existence, growing year by year, since its owner had his or her first job as a trainee.

9.2 The system by which contacts and sources of information are built up rests essentially on mutual trust and cooperation. On the one hand the journalist relies on being given accurate information upon which to base his or her story and on the other the source relies, where necessary, on not being identified or otherwise compromised. In such circumstances it is a cardinal rule of journalism that the identity of the source remains confidential.

9.3 Given the fact that people who speak to

reporters on this basis are frequently breaking some duty of confidence they themselves owe to a third party, e.g., an employer, it is not surprising that the journalistic principle of protecting sources clashes from time to time with the rather different priorities of tribunals and courts of law.

9.4 The outcome of such clashes has varied according to the circumstances of each case, but courts have been known to take a hard line. In the early sixties, three journalists in England were ordered by the Tribunal of Inquiry looking into the case of Vassal the admiral spy, to reveal the sources for stories they had written at a very early stage in the scandal which accurately identified the traitor. All three refused and two of them went to prison for contempt; the third reporter escaped such drastic punishment only because his source came forward voluntarily.¹

9.5 In the case against Mullholland, Lord Denning identified the interests of justice as being the primary consideration in deciding whether to order disclosure:

¹. Attorney General v. Clough, (1963) 2 W.L.R. 343; Attorney General v. Mullholland and Foster, (1963) 2 W.L.R. 658 (C.A.).

The judge ... will not direct him to answer unless it is not only relevant but also a proper and indeed necessary question in the course of justice to be put and answered.

In Clough's case Lord Parker cited 'the interests of the state' as being the dominant consideration.

9.6 Whether or not a court or tribunal orders a journalist to reveal the identity of his or her source is, of course, always a matter of discretion for the judge. It is clear from the old cases that, although journalists do not have the absolute privilege against disclosure which cloaks the lawyer/client relationship, the courts were reluctant to force them to betray their sources unless the interests of justice or of the state demanded it. Indeed after the Mullholland case the Attorney General told the House of Commons, somewhat defensively, that in the previous eighty years there had only been about six instances where such disclosure had been required.

9.7 In India both Mr Vir Sanghvi, editor of Sunday newsmagazine, and Mr Govindan Kutty, author of Seshan: An Intimate Story, appeared before the Jain Commission, probing the conspiratorial aspects of the Rajiv Gandhi assassination. Making a dramatic disclosure about the

reference to an unnamed aide of the then Prime Minister, Mr Chandra Shekhar, in his article,² Mr Sanghvi told the Commission that the aide in question was Rajmangal Pandey who has since died. The write-up had referred to the aide as having told Mr Sanghvi after the assassination in May 1991 that a high government official had met the Prime Minister and alleged that one of the members of the Government was involved in it. Mr Sanghvi was acting in accordance with law because the Indian Evidence Act 1872 does not recognise any privilege for journalists to keep their source a secret.

9.8 In England, protection in this regard has now been given by statute. Both the principle itself and the considerations which may override it are set out in statutory form by Section 10 of the Contempt Act 1981.

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that it is necessary in the interests of justice or

². Vir Sanghvi: "Who Killed Rajiv Gandhi?" Sunday, Oct 30-Nov 5, 1994.

national security, or for the prevention of disorder or crime.

19.9 The strength of the protection afforded by Section 10 was tested in Secretary of State for Defence v. Guardian Newspapers Ltd. On 31 October 1983, under the headline 'Heseltine's Briefings to Thatcher on Cruise', The Guardian published a confidential memorandum prepared by the Secretary of State for Defence on the question of Cruise missiles and their arrival in Britain. The Government demanded the return of its document and the newspaper, realising that the marks on their copy of the memorandum would identify their source, cited Section 10 of the Contempt Act and refused. The conflict was between protection of a journalistic source and national security. In each of the courts, right up to the House of Lords, national interest prevailed. According to the Master of the Rolls, Lord John Donaldson, there was hardly a contest:

The maintenance of national security requires that trustworthy servants in a position to mishandle highly classified documents passing from the Secretary of State for Defence to other Ministers shall be identified at the earliest possible moment and removed from their positions. This is blindingly obvious. Whether or not the Editor acted in the

public interest in publishing the document was not the issue. The Secretary of State's concern was quite different. It was that a servant of the Crown who handled classified documents had decided for himself whether classified information should be disseminated to the public. If he could do it on one occasion he might do it on others, when the safety of the state would be truly imperilled.³

9.10 The duty of a witness duly summoned to give evidence in a court is generally regulated by the Indian Evidence Act 1872. It is the scheme of the Act that in a court, a witness is compellable to answer all questions relevant to the facts in issue, except where a specific provision of the law excuses him from disclosing particular information, or prohibits him from so doing. Such a privilege is recognised for certain situations, but a journalist is not one of the persons exempted from the general duty of disclosure in a court. There is no reported High Court decision on the subject. However, Mr P.M. Bakshi⁴ is narrating two incidents. In the first

³. Secretary of State for Defence v. Guardian Newspapers Ltd (1984) 10 Current Law Notes of Latest Cases 394 (H.L.). In fact the Master of the Rolls made one mistake. The source, as it turned out when the newspaper handed back the document, was not a 'he' but a 'she'. Sarah Tisdall, a junior civil servant in the Foreign Office, was sentenced to six months imprisonment.

⁴. P. M. Bakshi, Press Law: An Introduction (TRF Institute for Social Sciences Research and Education, New Delhi, 1986), pp 98-99.

case, Kaliprasanna Kavyabisharad, editor of HITABADI, declined to say who was the writer of a poem published in his paper for which he had been charged with libel. The manuscript was produced in court, but with the portion in which the name of the writer appeared torn off. Kaliprasanna preferred to go to jail rather than disclose the name of the contributor. He was sent to jail for nine months. In the second case, Bipin Chandra Pal refused to depose in court who was the author of an article for which Aurobindo Ghose was being tried for sedition. Aurobindo Ghose was subsequently acquitted, but Pal was sent to jail for six months for refusal to depose as to the above fact. In Debi Prashad Sharma v. E.,⁵ the Chief Justice had requested that the journalist reveal his source of information. The Privy Council, however, did not go into this aspect of the matter.

9.11 In the Branzburg case⁶, the American Supreme Court refused to accept the plea that the journalists' right to refuse to disclose the source of information flows from the constitutional guarantee of the freedom of the press. However, recognising the privilege, Mr Justice

⁵. A.I.R. 1943 P.C. 202. See further C. Sarkar (ed.), The Press and the Law (1968), pp 39-48 (essay by C.P.Gupta): 52-54 (essay by Y. Kumar).

⁶. Branzburg v. Hayes, (1972) 408 U.S. 663.

Douglas, in his dissenting judgment, observed:

The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.

9.12 It was in reliance on this dissenting judgment that Mr Floyd Abrams, counsel to New York Times⁷, had written in an article (after referring to the function of the press to explore, inform and expose) as under:

It is the ability of the press to fulfil that function which, I believe, is and ought to be at the heart of the question as to whether, and to what extent, journalists should be exempt from the obligation of any other people to testify as to any such matters.

9.13 Though there is no federal legislation on the subject, State legislation in the United States presents a variety. Protection of the identity of a newsman's informant from disclosure in judicial proceedings and proceedings before legislative committees has been considered in many States as necessary to maintain a flow of information to the public. It is taken for granted that such protection will not unduly hamper the judicial

⁷. Floyd Abrams, "Protection for confidential news sources is essential for good journalism," Centre Magazine, 35-38.

and legislative process. These statutes generally protect the confidential sources of persons connected with, engaged in or employed by specified news media. Some of the States extend the privilege not only to newspapers, but also to other periodicals and press associations and in certain cases to radio and television also.

9.14 In some States, the privilege is absolute. This means that at no time and under no circumstances can the journalist be compelled to reveal his source of information. Some of the Circuit Courts (Courts of Appeal) have shown a readiness to recognise a limited protection for journalists' sources.^a

9.15 Professionally, the American Newspaper Guild has adopted a code of ethics which in canon 5 states as under:

That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies...

9.16 It seems there are serious conflicts of values which society has to consider. On the one hand, there is

^a. See the Caldwell case: Vincent Blasi, "Privilege in a time of subpoenas," (21 Dec 1970) Nation, p. 653.

the consideration that for centuries,⁹ the law has acted on the postulate that it is entitled to every man's evidence, and has not recognised the principle that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected.¹⁰ As pointed out by Bakshi, it is as agonising for a judge to have relevant evidence withheld from him, as it is for the reporter to find facts, painfully elicited by him on a promise of secrecy, ruthlessly laid bare in a court.

9.17 The Law Commission of India has recommended that while an absolute privilege need not be given to reporters in respect of sources of information obtained by them in confidence, the court should (by amending the Indian Evidence Act) be vested with the discretion not to compel a reporter to make such disclosure in the circumstances of the case. In exercising the discretion, the court will obviously be expected to weigh the demands of discovery of truth against the demands of professional ethics by which a journalist is bound.¹¹

⁹. For history, see Blair v. U.S., (1919) 250 U.S. 273.

¹⁰. Wheeler v. Le Merchant (1881) 17 Ch.D. 675.

¹¹. Law Commission of India, 93rd Report, Protection of mass media in respect of confidential information.

9.18 Power to summon and enforce the attendance of persons and examining them on oath as also to require the discovery and to inspect documents gives the Press Council of India a great advantage which is not available to a voluntary body. Section 16 of the Press Council of India Act, 1978 gives the Council power to receive evidence on affidavit, to requisition any public record or copies thereof from any court or office and to issue commissions for the examination of witnesses or documents. But, at the same time, another wholesome provision has been made in the next section namely, newspapers, news agencies, editors or journalists shall not be compelled to disclose the source of any news or information whether published or not. This express provision does not exist in other countries.¹²

¹². In an attempt to empower the press, Mr Ramakrishna Hegde had incorporated a provision in his aborted Karnataka Freedom of Press Bill 1988 which reads thus:

2. Immunity of a journalist or a worker in the press from disclosure of source of information.-Notwithstanding anything contained in any other law for the time being in force, no court shall compel a person to disclose the source of any news or information nor declare a person to be guilty of contempt of court for refusing to disclose the source of any news or information in whatever manner obtained in respect of a publication for which he is responsible unless it is established to the satisfaction of the court that such disclosure is indispensable in the interest of justice or national security or for the prevention of disorder or crime.

9.19 While asserting its right to hold on to its own confidential sources, what the press is actually demanding is a right to break confidences. What it wants to publish is confidential information. At present, the law relating to confidentiality has been given a sufficient amount of importance preventing a private individual from publishing such information except in extreme circumstances.¹³ This is a salutary rule because while it is in the public interest that the truth must be told, it is also in the public interest that individuals in a society feel that their confidences will be protected. It is in the public interest that in a society people should maintain other's confidences. The circumstances when the courts or the government or commissions of inquiry can force these confidences broken have been narrowly defined. The press has yet to make out a general case for the extension of these exceptions to cover its work. The press will have to show that the public interest in its work is more important than the public interest in maintaining confidences.

¹³. On breach of confidence see, Frazer v. Evans, (1965)1 All. E.R. 8; Margaret, Duchess of Argyll (Feme Sole) v. Duke of Argyll, (1965)1 All. E.R. 611 where the previous case law is discussed. This line of case law virtually begins with Prince Albert v. Strange, (1849) 64 E.R. 293, a case decided by the old High Court of Chancery which prompted Warren and Brandeis to submit that an embryonic right to privacy did exist at common law; see also Follard v. Photographic Co., (1888) 40 Ch.D. 345 (also implied breach of contract); Lord Ashburton v. Pope, (1913) 2 Ch. 469.

CHAPTER 10
THE LAW OF DEFAMATION

Free speech does not mean free speech:
it means speech hedged in by all the laws
against defamation, blasphemy, sedition
and so forth; it means freedom governed
by law.

Lord Wright M.R.¹

10.1 The origins of the laws relating to defamation date back as far as King Alfred the Great who, in the ninth century, decreed that slanderers should have their tongues cut out.² Although over the years the penalties imposed upon those who transgress this branch of the civil law have become financial rather than physical, the principles have remained virtually unchanged. The legal rationale was expressed with great clarity by Justice Potter Stewart of the American Supreme Court in 1966:³

The right of a man to the protection of his own reputation from unjustified invasion and

¹. James v. Commonwealth of Australia, [1936] A.C. 578.

². Tom G. Crane, Law and the Media, Oxford: Heinemann Professional Publishing, 1989), p. 1.

³. Ibid., p. 1.

wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of liberty.

10.2 Like many areas of law, defamation is a marriage of conflicting rights and interests. On the one hand is the principle which wholly underlies this particular course of action i.e., that a man's reputation should be protected from wrongful injury. On the other hand there are certain prevailing social interests which the law decrees that protection of reputation will take second place. Freedom of expression is the most significant of these dominant interests and a free press is, of course, a fundamental part of that right.

10.3 When the Rajiv Gandhi Government was forced to withdraw the ill-conceived and now infamous Defamation Bill in 1988 under pressure of a nationwide demand, it was a triumph for the Press Council because its intervention in the public debate on the Bill and its attempt to establish itself as a primary consultee on legislation concerning the press gave the Council an image apart from an adjudicator of complaints. The bane of the 1988 Bill was that it was clearly aimed at the

muzzling of criticism of the government and prevention of investigative journalism, especially where governmental corruption is concerned.

10.4 In the context of the free speech guarantee it is only fit and proper for us to import some of the principles recognised and adopted in US defamation law. Basically wherever there is a public interest component no action for defamation will lie in the United States unless the defamed person can show that the defamatory statement or allegation in question was made with actual malice. Thus in New York Times v. Sullivan⁴ a paid advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South accused the law enforcement officials in Montgomery, Alabama, of being racist, following the comments of a police official. The elected police commissioner of Montgomery brought an action for libel against the *Times* and several of the individual signatories to the advertisement. The court dismissed it in the following terms:

Debates on public issues should be uninhibited, robust and wide open - and may include sharp, unpleasant attacks on the government. The

4. (1964) 376 U.S. 255 at 270.

constitutional protection does not turn upon the "truth, popularity or social utility of the ideas and beliefs which are offered". Some degree of abuse is inseparable from the proper use of everything... Injury to official reputation affords no more warrant for repressing speech that does factual error... The constitutional guarantee requires a federal rule that prohibits a public officer from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with actual malice... The Constitution affords to the press an absolute and unconditional privilege to criticize official conduct, despite the harm which may follow from excesses and abuse...

10.5 Thus a US public official is in effect debarred, in the absence of actual malice, from bringing defamation suits with regard to his official reputation. This principle was later extended by the Supreme Court in Rosenblum v. Metromedia Line⁵ to even cover defamation of a private person if the statement concerns a matter of public importance. This decision is a clear acknowledgement of the role of the press in informing the public of certain issues in so far as it concentrates not upon the public/private character of the person defamed, but on the subject matter discussed. Where the public interest component is not present, the individual's right to privacy will prevail.

10.6 The principle of Sullivan was carried forward

⁵. (1971) 403 U.S. 29.

by the House of Lords in Derbyshire County Council v. Times Newspapers Ltd⁶. The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. Delivering the judgment, Lord Keith recalled that in the Spycatcher case⁷, the House of Lords had opined that "there are rights available to private citizens which institutions of ... government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech".

10.7 Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in Leonard Hector v. Attorney General of Antigua

⁶. 1993(2) WLR 449

⁷. Attorney General v. Guardian Newspapers Ltd. 1990(1) AC 109.

and Barbuda^e which arose under S. 33(B) of the Public Order Act 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. Quashing the criminal proceedings launched against a newspaper editor under the said provision, Lord Bridge of Harwich observed:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most invidious and objectionable kind.

10.8 This private/public distinction is not altogether strange to the Indian criminal defamation law as is evident from the second and third exceptions in section 499 of the Indian Penal Code.⁹ However, it is

^e. 1990(2) AC 312.

⁹. Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his

negligence which is the standard for liability in such cases, and not actual malice, as with the US law, and the exceptions to section 499 have not proved as useful or protective to Indian journalists as have the US precedents to the American press. More importantly, these public/private distinctions are confined to the criminal law of defamation. The civil law recognises no such distinctions, and public officials or private individuals who have been defamed where a matter of public interest is concerned have as much standing and enjoy exactly the same rights in civil defamation law as do private individuals who have been defamed where there is no public interest component.

10.9 Recapitulating these well-known Anglo-American

character appears in that conduct, and no further.

Third Exception.-It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

legal principles, our Supreme Court in a seminal judgment rendered in the Nakkheeran case¹⁰ held that the Government, local authority and other organs and institutions exercising governmental power could not maintain a suit for damages for defamation. Leaving open the issue of the right of the officials to prosecute a publication under sections 499 and 500 of the Penal Code, the court categorically asserted that neither the government nor the officials who apprehend that they may be defamed have the right to impose a prior restraint upon the publication.

10.10 It is submitted that the criminal law of defamation be altogether abolished, which is the situation in the United States, while the civil law should be reformed, incorporating these public/private distinctions. In England also criminal prosecutions for libel are on the decline; and in 1975 the Faulkes Committee on Defamation actually considered its abolition. It was concluded, however, that the offence should be preserved - particularly as a worthwhile sanction against those instances where the libellous matter may be gross and persistent and the conduct of the

¹⁰. B Rajagopal v. State of T.N., AIR 1995 SC 264.

defendant very bad indeed'.¹¹ The Royal Commission on the Press, known as the McGregor Commission, however, recommended that all prosecutions for criminal libel should be conducted by the Director of Public Prosecutions, and private prosecutions for libel should no longer be permitted.¹²

10.11 The above submission is particularly relevant because a journalist in the present circumstances could face two separate proceedings for the same article and although civil and criminal proceedings for defamation are entirely separate and independent, with different requirements and components, the remedies are cumulative, not alternative.¹³

10.12 While adjudicating on a complaint¹⁴ filed by the Government of Tamil Nadu against the Illustrated Weekly of India alleging that an article written by Cho Ramaswamy, making various allegations of corruption

¹¹. Faulks Committee, Report on the Law of Defamation, Cmd 5909, (March 1975).

¹². Report of the Royal Commission on the Press, Cmd 6810, pp 191-193, paras 19.35 to 19.36 (July 1977)

¹³. Ashok Kumar v. Radha Kanto, A.I.R. 1967 Cal. 178.

¹⁴. The Illustrated Weekly of India/Government of Tamil Nadu, 1984 Ann. Rep. 96.

against Chief Minister M G Ramachandran and his Government was defamatory, the Press Council made the following observations on the general pleas often taken in defence of the impugned publications.

Good faith or honest belief

10.13 It seems to have been assumed at some places that good faith in itself is a defence to liability that might arise otherwise for a statement which is found to be untrue and defamatory or whose truth cannot be established. This, however, is not law. Good faith may be an essential ingredient of some of the defences, but it is not in itself a defence. Honest belief in the truth of an allegation also does not suffice in law to confer immunity from liability for defamation. The defendant in a proceeding for libel must prove objectively that the allegation made was in fact true. If an allegation turns out to be untrue, then even a guarded statement expressing doubt about some aspect of the character of the complainant is punishable. Nor does the fact that the person defamed is a 'public figure' make a different rule applicable.

Public interest

10.14 Fair comment on a matter of public interest is, no doubt, a well-recognised defence, but that defence is confined to comments. It does not protect untrue statements of facts, even if the matter is regarded as one of public interest. The fact must be established as true. If that is done, then the expression of honest opinion is protected where the matter is of public interest. But, the facts must be proved to be true.

Reliance on newspaper reports

10.15 If a statement is made on the basis of newspaper reports, it is no defence in itself. If the statement turns out to be untrue, it may be defamatory.

Repetition of libel

10.16 It is not a defence that an impugned statement merely repeats something published elsewhere and the use of the words such as 'alleged', 'learnt from reliable sources' and 'reported' does not, therefore, improve matters. In other words, the law does not permit an argument (i) that the maker of an impugned statement has not himself made the allegation of misconduct

independently, and (ii) that all that he says is that a person has reported to have committed certain misconduct. Publication of rumour that a person has been guilty of misconduct is as libellous as the direct charge.

Parliamentary proceedings

10.17 It was suggested in the course of arguments that the allegations were based on matters discussed in the State Legislature and were protected on that score. This argument, however, cannot be substantiated on the facts of this case. The article in issue does not purport to be a report of an Assembly proceedings held contemporaneously or otherwise. It does not purport even to be a summary of the Assembly debates. It is intended to be an independent contribution and is expected to be so regarded by the prospective readers. It cannot, therefore, claim any protection that may be available under the Constitution or the law in regard to reports of proceedings of the legislatures.

10.18 The following principles evolved as a result of the deliberations of the Council in its adjudication on complaints relating to defamation and scurrilous writings:

1. As regards the journalistic propriety of the publication of a libel on a public servant or a public figure, two factors are relevant:

(a) The analogy of exception 2 to section 499 IPC is applicable under which matter published in good faith pertaining to the conduct of a public servant in discharging his public functions or as regards his character does not constitute libel.¹⁵

(b) Before going into the question of good faith, the allegation must be found to be untrue. It is presumed that a person has a good character unless proved to the contrary, i.e., no presumption exists as to libellous statements being true. But it is equally true that the respondent cannot be censured unless the publication of an untrue statement is proved against him. No action may be taken against the editor unless the complainant leads evidence to support the complaint.¹⁶

¹⁵. Government of Goa/Blade, 1969 Ann. Rep. 12

¹⁶. Ibid.

2. Comments on the public conduct of a political leader and on the views held by him are not improper. However, the same cannot be said to a reference made to his private life. The editor would not be guilty of journalistic impropriety when the facts do not clearly forbid certain inferences which the editor has drawn.¹⁷

3. For publication of false news items without verification in order to defame the complainant, the editor is open to censure. An apology from him is not acceptable where he starts a newspaper clearly with the object of blackmailing local officials or public men, but failing in that objective, decides to close it down.¹⁸

4. Constant publication of certain indecent, obnoxious or defamatory writings with the object of extracting money by blackmail by the editor will entail the penalty of

¹⁷. Kapur Singh/Quami Ekta, 1973 Ann. Rep. 34.

¹⁸. R M Sharma/Daman Virodh, 1972 Ann. Rep. 138.

censure.¹⁹

5. An article carrying deliberate allegations by an editor, which are not true and proved to be incorrect, is in the nature of a blackmail intended to threaten the complainant into submission to his dictates. As such, it may be described as "the worst type of journalistic impropriety and misconduct".²⁰

6. An editor may read "between the lines" and bestow political colour to events which may be correct. However, he may not publish what is characterised in the paper itself as a rumour, with apparently no evidence in support. Indulgence in this type of character assassination shows irresponsibility on his part.²¹

7. Compromise effected between the parties

¹⁹. Case of Bharti Leader, Jan. 1983 P.C.I. Rev. 55; case of Yug Mandal, 1973 Ann. Rep. 84.

²⁰. Case of Campus Reporter, 1972 Ann. Rep. 125.

²¹. Case of Sigappa Nada, 1973 Ann. Rep. 85.

indulging in "libellous personal attacks without any regard to journalistic ethics or propriety" will not render a complaint liable to rejection. Mudslinging in the newspaper and the defence of the editor that it was done in retaliation of similar conduct by the complainant leaves both parties open to censure.²²

10.19 The case of Indian Express²³ is an illustrative one in understanding the position of the Press Council vis-a-vis cases of defamation. The complaint was filed by Mr Harkishan Singh Surjeet, member of the CPI(M) Politbureau, alleging that the article written by editor Arun Shourie and published on the front page of the Indian Express dated 1.6.1990 under the caption SHEKHAR, LIMAYE ENTICE CPI(M) TO BREAK GOVERNMENT: OPEN WAR was defamatory. It was alleged in the story that Mr Chandra Shekhar and Mr Madhu Limaye had met the complainant and conveyed a plan to bring down the National Front government of Mr V P Singh at the Centre and replace it by a government comprising of Janata Dal and Congress-I headed by Mr Jyoti Basu. When

²². Case of Kewal Satya, 1973 Ann. Rep. 78.

²³. 1991-92 Ann. Rep. 125.

controverted, the newspaper took up the position that it was standing by the story.

10.20 It has been held by the Press Council in a series of adjudications that the fundamental principles (shorn of their technicalities) underlying the Exceptions (particularly Exceptions 1 and 2) to Section 499 of the Indian Penal Code are applicable by way of analogy as part of the journalistic ethics.²⁴ 'Good faith' is the keystone of the arch of the principle of journalistic ethics evolved by the Press Council on the analogy of Exceptions 1 and 2 to S. 499 IPC. For the purpose of giving protection of this principle (against a charge of publishing a baseless, defamatory story), nothing may be published without due care, circumspection and enquiry.

10.21 As observed by the Press Council in Vasanth Sathe/The Independent,²⁵ the extent, nature and mode of the enquiry is largely a question of fact depending on the circumstances of each case. Nevertheless, one broad norm of practice which, normally, in cases of this kind

²⁴. For precedents, see case of Blaze, supra note 6; Case of Surya India, 1990 Ann. Rep. 61; Case of Organiser, 1990 Ann. Rep. 72; and case of The Independent, 1991-92 Ann. Rep. 58.

²⁵. Ibid.

will help is that whenever a newspaper receives a report containing allegations which are likely to lower the esteem or harm the reputation of any public figure or person, the editor should, before publishing it, verify its truth from the person concerned to elicit his version or reaction and publish that also along with the report/article. If the person concerned refuses to give his counter version, a footnote to that effect should be published. If the editor's mind is left rocking in doubt with regard to the veracity of any part of the report/article, he should omit from publishing it.

10.22 In regard to the appending of the post-script "I.E. stands by its report" to the rejoinders/denials of the complainant, the Council felt that it was not justified. In the companion complaint filed by Mr Limaye,²⁴ the Council expressed displeasure at the sensational caption given to the story. This caption casts its shadow on the entire impugned story, giving the impression that what was Mr Shourie's own comment or speculation has been passed on as a factual comment. This style of presentation is repugnant to the norm of journalistic ethics which cautions journalists not to mix

²⁴. 1991-92 Ann. Rep. 139.

up their own comments and conjectures with facts.

10.23 A marked increase is evident in the institution of defamation cases against the press by public men - politicians in particular. A 15-year-old case, instituted by Mr Jagmohan, former Lt Governor of Delhi, against Indian Express for a report holding him responsible for the notorious Turkman Gate demolitions during emergency, was concluded in 1992 in the court of the Metropolitan Magistrate, Delhi, with the conviction of the then editor, Mr S Mulgaokar, and reporter, Mr Javed Laiq. The judgment gave rise to varied responses on the issue of delay in the trial of the case and also on whether an editor could be held personally responsible for all that appeared in the paper. Another distressing trend discernible from the Annual Reports of the Press Council is the increasing incidence of complaints being upheld against the press by the Council on the ground of defamation. In 1992-93 the Council upheld 63 complaints while rejecting only 13 in the category of defamation. It may be noted that the total number of complaints upheld against the press during the period was 81.

10.24 The present study does not purport to be a full examination of all aspects of the law of defamation

because the focus is on the aspects of special interest to the media. Although libel actions in India are not in terms of statistics as numerous as in the United States or in the United Kingdom, the number of matters brought before the Press Council is fairly large as indicated in the preceding paragraph. The recommendations of the Council,²⁷ particularly those relating to innocent dissemination of news, unintentional defamation, partial justification, fair comment, reports of certain proceedings to which qualified privilege attaches etc., deserve serious consideration by the Government while enacting a suitable legislation in line with the [English] Defamation Act. Such a legislation to replace the present uncodified position on the subject is highly necessary for removing a number of anomalies and liberalising the law keeping in view the constitutional rights regarding freedom of speech and expression and the reasonable restrictions that can be placed on it.

²⁷. For details of the recommendations, see, F M Bakshi, Law of Defamation: Some Aspects, (N M Tripathi, Bombay, 1986), pp 127-137.

Chapter 11

PROTECTING PRIVACY

11.1 Protection of privacy is a relatively recent concern of law. The concept of privacy can safely be studied in conjunction with the law of defamation though, theoretically, the scope of each is different and the values which each seeks to protect are also different. Protection against defamation and protection against breach of privacy really cover two distinct areas of a person's life. The law of defamation protects the reputation of an individual; the law of privacy protects his feelings: the former is external while the latter is internal though the same statement can simultaneously injure both.

11.2 Privacy is a multi-faceted concept

compendiously described as the right "to be let alone".¹ Except in the case of celebrities and criminals - they either waive or forfeit this right - privacy is an issue in everyone's life. Distinct from isolation or loneliness, it is a conscious or unconscious attempt to free oneself from the interference or influence of other people, of society or the establishment at large.²

11.3 Privacy is a topic having several aspects, not all of which have a direct bearing on speech and expression. However, it is interesting to note that the concept, sprouting from the seminal contribution of the famous jurisprudential collaborators, Samuel Warren and Louis Brandeis,³ was the result of their irritation at a Boston newspaper which published gossip of Warren's social activities. Yet, strangely enough, this is the one kind of invasion of privacy to which courts have

¹. To use the famous expression first coined by the American scholar, Thomas Cooley, who is regarded as the father of the term "privacy". The phrase used in Cooley on Torts (1888) was quoted by Warren and Brandeis in their article. See infra n. 3.

². See Hall, E.T., The Silent Language (London: Doubleday, 1959).

³. Warren and Brandeis, The Right to Privacy, 4 Harv. L.R. 193 (1890).

shown the most tolerance. The basic concepts of the libertarian press, the self-righting process, and the American constitutional guarantee of freedom of the press are influenced by the idea that the truth should be told because the people have a right to know it.

11.4 How have American courts attempted to resolve the conflict between privacy and freedom of speech? This is a conflict which assumes particular importance in the United States because of the First Amendment to the Constitution where we find a firm prohibition upon any law which abridges the freedom of speech or of the press. It has exerted a considerable influence not only upon the development of the American law of privacy but also upon the law of defamation.

11.5 In this particular sphere, American courts have acted upon two broad criteria:

- (a) Freedom of the press extends to matters of public interest, and the Constitution would not, therefore, permit the raising of any objection based on a claim to privacy. Such a claim conflicts with a freedom guaranteed by the Constitution.⁴

⁴. Time v. Hill, (1967) 385 U.S. 374.

(b) The above freedom does not extend to matters of private interest and if the ordinary principles of law recognise an action for breach of privacy, such recognition would not conflict with any constitutional freedom.⁵

11.6 This conflict can be illustrated by reference to some of the leading American cases. First, the case, Elmhurst v. Pearson,⁶ which exemplifies the comparatively wide area in which free comment is permitted upon matters of public concern. The plaintiff had been one of the accused in a notorious sedition trial. During the course of the trial he had obtained work as a waiter in a hotel. A radio broadcaster commented upon this fact during a broadcast. His identity revealed, the plaintiff had lost his job. However, his action failed for reasons explained by the Court of Appeals for the District of Columbia. In the words of the court, "it is well settled in the jurisdictions which entertain (actions for invasion of privacy) that one who becomes an actor in an occurrence of public or general interest must pay the price of

⁵. Cox Broadcasting Corpn v. Cohn, (1975) 420 U.S. 469.

⁶. 153F.(2d) 467 (1946). U.S. Court of Appeals, Dist of Colombia.

publicity through news reports concerning his private life, unless these reports are defamatory".

11.7 Also in Sidis v. F.R. Publishing Corpn,⁷ a former child prodigy, once in the public eye but living for over twenty years in obscurity, was held to be an unprotected subject for a magazine piece about his subsequent eccentric life. A privilege is enjoyed for news or matters of general interest, which the court found to be present here; and obscure doings may be as interesting as prominent ones.

11.8 On the other hand a Californian court came to a different conclusion in Melvin v. Reid.⁸ A reformed prostitute, accused and acquitted in a sensational and widely publicised murder trial seven years before, had since married and lived a life of respectable obscurity. A motion picture account of the crime used her real unmarried name in portraying her earlier life. Violation of privacy was found by the court, indicating that lost privacy, like lost virtue, can be recovered and can again become the subject of protection. The film was nothing more than a commercial venture, and so

⁷. 113F. (2d) 806 (1940).

⁸. 112 Cal. App. 285 (1931).

without privilege for the harm it caused.⁹

11.9 Finally we turn to what is probably the most famous of American cases on privacy, Time Inc v. Hill,¹⁰ a decision of the United States Supreme Court in 1967, which involved a straight confrontation between the individual's desire to be let alone and the freedom of speech provisions of the First Amendment. James Hill alleged that an article in Life magazine falsely portrayed an experience suffered by himself and his family when they had been held hostage in their own house for 19 hours by three escaped convicts. The article complained of was one describing a play, The Desperate Hours, which was a fictionalised account of a family being held captive by three escaping convicts. However, Life had, under the headline "True Crime Inspires Tense Play," portrayed it as a re-enactment of the Hills' experience, an experience which had been much in the news three years earlier. At that time Hill had made it quite clear that the family was scared but

⁹. Phoolan Devi's objection to Shekhar Kapur's Bandit Queen assumes relevance in this context. The film, acclaimed as a landmark in Indian cinema, was permitted to be screened only after effecting a few modifications to assuage the former dacoit who felt that it was the true story of her life.

¹⁰. Supra note 4.

was not mistreated during the ordeal. In the play the fictional family suffered violence at the hands of the criminals. Also ever since their true life experience the Hills attempted to avoid publicity as much as possible. The family desired nothing more than to be able to live in peace and to forget the entire episode. Now their three-year-old ordeal had been sensationally revived in an exaggerated manner.

11.10 Hill brought suit in New York for invasion of privacy. Time Incorporated, Life's publisher, was held liable. It was upheld on appeal. The appellate division ruling stood in stark contrast to the long tradition of rulings in New York which supported the concept of an unfettered press. The publisher sought a hearing by the United States Supreme Court, claiming that its constitutional guarantee of freedom of speech and of the press had been denied by the findings of the New York courts. The appeal was allowed by a majority of the court which said the subject matter of the article, the opening of a new play linked to an actual incident, was a matter of legitimate public interest. As such it was protected by the First Amendment. That protection would be lost only if a false story was published with knowledge of its falsity or in reckless

disregard of its truth. Justice Brennan, who wrote the opinion for the court, said the New York jury had not been properly instructed and called for a new trial to measure the actions of Life's editors under the standard of knowing falsity or reckless disregard.

11.11 In the opinion of the majority of the court, the defendants had displayed recklessness in publishing the article by failing to make a reasonable investigation of the facts of the story. Justice Fortas was distressed by the majority's lack of support of the right of privacy. Important as the rights guaranteed by the First Amendment were, there were also, in the words of Justice Fortas, other "great and important values in our society ... which are also fundamental and entitled to this court's careful respect and protection".

11.12 This division of opinion does demonstrate the difficulty faced by courts in drawing a line between privacy and freedom of speech. It is a conflict between two fundamental human rights, each of which is contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹

¹¹. Articles 8 and 10.

11.13 Despite the fact that the United Kingdom is a signatory to the convention, the cherished right of privacy has not yet been enacted as part of the English law. The Englishman has no freedom from undesired publicity except the remedy in defamation. However, the costly tort of defamation does not protect a person against public disclosure of true information about himself however much damage and suffering such a disclosure might cause him. This is in sharp contrast with the position in the United States and France where disclosure of even true information about an individual's private life is protected if only such disclosure is upon a matter of legitimate public interest.

11.14 Enlightened opinion in England is in favour of the acceptance of the law of privacy. Three Bills were introduced in the Parliament during the 1960s to create such a right.¹² None of them was adopted. There has also been considerable support outside the Parliament for the creation of a right of privacy. The National Council for Civil Liberties and Justice, the British section of the International Convention of

¹². By Lord Mancroft in 1961, Mr Alexander Lyon in 1967, and Mr Brian Walden in 1969. They are set out in the Younger Report, Appendix F, pp 273-278.

Jurists, have both supported such a right. Academic writers, notably Winfield,¹³ have supported it, as have some judges both inside¹⁴ and outside¹⁵ court. However, two important law reform committees had recommended against legislation to confer a legal right of privacy. While the Porter Committee on the Law of Defamation (reported to the Parliament in 1948) outrightly rejected the idea of privacy, the Younger Committee on Privacy, appointed in 1970, also could find no necessity for a general right of privacy. In essence the major argument of those who oppose the enactment of a general law of privacy is that such a step would tilt the delicate balance between individual privacy and freedom of speech too much against the latter.

11.15 There was a time when British newspapers concealed the developing crisis leading to the abdication of Edward VIII until days before the event; but now the tabloid press in Britain is playing havoc

¹³. See F.H. Winfield, "Privacy" (1931) 47 L.Q.R. 23.

¹⁴. See e.g. Lord Scarman in Morris v. Beardmore [1980] 3 W.L.R. 283 at p.296.

¹⁵. Lord Denning, What Next in the Law, (1982), p.267.

with the personal privacy of public figures, even the royal family not excepted. Amidst the growing demand for statutory regulation of the press, the Calcutt Committee reported in 1990 that individual privacy was not to be considered in isolation but must be weighed along with freedom of speech and expression¹⁶. Setting aside proposals for statutory control, the British press was put on a period of probation at the end of which Sir David Calcutt suggested the introduction of a new tort of infringement of privacy. The Calcutt Report and its suggestions were considered by the National Heritage Committee of the House of Commons and its report was published in 1993. The introduction of a Protection of Privacy Bill is a major recommendation of the committee.¹⁷

11.16 The position in India is substantially the same as in England. In the absence of any guarantee in Part III of the Constitution such as that contained in the Fourth Amendment of the U.S. Constitution nor any omnibus residuary clause relating to unenumerated rights as in the Ninth Amendment, the right of privacy

¹⁶. Report of the Committee on Privacy and Related Matters (Cmd 1102, 1990).

¹⁷. (1992-93) Ann. Rep. 11-12.

could be developed only by a liberal interpretation of the guarantee of 'personal liberty' in Article 21. Although the Supreme Court had failed to make use of the first available opportunity, the divided opinion in Kharak Singh¹⁹ opened avenues through which the right could be ushered in in subsequent cases. Described by Professor Upendra Baxi as "an example of judicial creativity at its best,"¹⁹ the seminal opinion expressed by that great judicial craftsman, Justice K K Mathew in Gobind²⁰ revitalised and extended the memorable minority opinion of Justice Subba Rao in Kharak Singh and elevated those values to high constitutional status in unmistakable terms. Later

¹⁹. Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295.

¹⁹. Upendra Baxi (Ed.), K K Mathew on Democracy, Equality and Freedom, (1978), p. LXXIV.

²⁰. Gobind v. State of M.P., A.I.R. 1975 S.C. 1379. Mathew, J observed at p. 1385:

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute.

See K K Mathew, "Right to be Let Alone," (1979) 4 S.C.C. (Jnl) 1.

Justice Mathew had occasion to explain right to privacy vis-a-vis freedom of speech thus:

The factual reporting in any news medium of current news in which the public has a legitimate interest has to be protected but at the same time a man's privacy has to be respected. This concept of legitimate public interest or news-worthiness and protection of privacy poses a dilemma. In general, the solution has been for judges to find this matter before them newsworthy while reserving the possibility that liability might ensue for some other factual account. This theoretical residuary category noted in dicta has been referred to as matters which outrage public decency.²¹

11.17 Gobind ended with the hopeful observation that the old rules and regulations, verging perilously near unconstitutionality, would yield to the essence of personal freedoms. Foreseeing great strides, Justice Mathew said the right to privacy in any event will necessarily have to go through a process of case-by-case development. However, the cherished right had a quantum jump in the Nakkheeran case,²² when the Supreme Court, while upholding the right of a magazine to publish the life story of a condemned prisoner without any prior restraint, declared that the right to

²¹. Supra note 19, p. 148.

²². R. Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264.

privacy is implicit in the right to life and liberty guaranteed by Article 21. While declaring that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters, the court made it subject to the exception that any publication concerning the aforesaid aspects would become unobjectionable if such publication was based upon public records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by the press and others. The most revolutionary and outlandish aspect of the judgment lies in the declaration that the right to privacy and for that matter the remedy of action for damages are simply not available to public officials with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made with reckless disregard for truth. In such a case it would be enough for the defendant to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen.

11.18 The Law Commission of India, while noting

the inadvisability of having a comprehensive legislation to deal with every aspect of the invasion of privacy, suggested the insertion of new sections in the Indian Penal Code to punish electronic eavesdropping and the taking of unauthorised photographs.²³ Pursuant to this, the Indian Penal Code (Amendment) Bill, 1978 was passed by the Rajya Sabha; but it lapsed following the dissolution of the Lok Sabha.

11.19 The Second Press Commission, while stressing the dire need to protect persons from emotional disturbances, anxieties, humiliations and embarrassment, did not recommend legislation beyond what the Law Commission had recommended. Pointing out the need to strike a correct balance between the citizen's claim to privacy and the public's right to information, the Commission recommended that the Press Council should be entrusted with the responsibility of looking into complaints of invasion of privacy and of monitoring the performance of the press. It was suggested that Section 13(1)(c) of the Press Council Act, 1978 should be amended by adding after the words "the maintenance of high standards of public taste" the

²³. The Law Commission of India, 42nd Report (1971).

words "including respect for privacy".²⁴

11.20 The Press Council is however of the view, as pointed out by the Chairman, Justice R S Sarkaria, in his speech at Calcutta University on 15 September 1993, that even under the present Act it is competent to hear and determine a complaint alleging invasion by a journalist of the personal privacy of the complainant where such invasion offends against the canons of journalistic ethics, decency or public good taste.

11.21 Indeed the Council had occasion to lay down guidelines for the press on this subject while warning four newspapers for their coverage of the murder of two nuns belonging to the Snehasadan in Bombay.²⁵ While reporting the murders, the Indian Express, the Times of India, the Free Press Journal and Samna had said, on the basis of post mortem and police reports, that both the murdered nuns had regular sexual intercourse and one of them had a sexually transmitted disease. Adjudicating a complaint preferred by the Superior and

²⁴. Second Press Commission Report (1982), Vol. 1, Chapter 6, pp 67-77, particularly paragraphs 41-44.

²⁵. Sr Cyrilla, Superior, Fransiscans of St Mary of the Angels, Snehasadan, Bombay v. Indian Express, Times of India, Free Press Journal and Samna, 1991-92 Annual Report 92.

Director of Snehasadan, the Council found that the impugned reports would show that those were manifestly injurious not only to the reputation, personal dignity and privacy of the murdered nuns but also had a tendency to affect the reputation of Snehasadan as an institution run by Catholic nuns for the care of destitute children. The principle had been settled by the Press Council in a series of adjudications that for justifying such a publication it was for the respondent newspapers to show:

(i) That what it had published was true, and further

(ii) That the impugned report was published in good faith (i.e. with due care and circumspection) for public benefit, in public interest.

11.22 The Press Council was of the opinion that these four newspapers had committed the following ethical improprieties and wrongs:²⁶

(i) By stating in the impugned publications that postmortem reports reveal/prove that the

²⁶. Ibid, at 108-109.

murdered nuns were used to sexual intercourse and one of them was suspected to be or infected with venereal disease, they attempted to pass on their own opinions/conjectures or comments as facts - things which did not find mention in the post mortem examination report. Thus, they committed a breach of the well recognised norm of journalistic ethic which requires newspapers to distinguish comment and fact; and not to elevate or dress up their conjecture/comment or hypothesis as a statement of fact.

- (ii) Even assuming that at the pre-publication stage, the respondents or reporters had heard from some source that the post mortem examination reports reveal what they had published, then also, as a matter of professional caution they should not have published the same, it being a sensitive matter touching the chastity and privacy of the murdered women.²⁷

²⁷. The post mortem report reads thus:

- a) Sister Priya

(iii) Police investigation to trace and bring to justice the culprits who had perpetrated these gruesome murders was pending and the impugned reports containing the opinions/comments of the reporters/editors had a strong tendency to influence and prejudice a fair investigation.

(iv) While the publication of the impugned story by these newspapers may not amount, in law, to contempt of court, it was, for the reason

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- i. hymen absent
 - ii. vagina patulous
 - iii. warts +++ (on both sides). Here the word venereal was struck off.
 - iv. reddish discolouration on lower vagina
 - v. whitish thick discharge +++
 - vi. no sign of struggle.

b) Sister Sylvia

- i. hymen absent
- ii. vagina patulous
- iii. reddish discolouration in lower vagina
- iv. whitish thick discharge +++
- v. no sign of struggle.

Condition no. (i) was the basis for the reporters' presumption that both the victims were not virgins. Condition no. (ii) was taken to indicate possible indulgence in frequent sexual intercourse. Condition no. (iii) was not strict proof and further examination was necessary to confirm the infection of venereal disease. The newspapers pleaded that they had only reported that one of them was suspected to have been infected with venereal disease.

aforesad, violative of the ethics of journalism, the range and terrain of which was broader than that of law.

- (v) The reporters were laymen and not experts in forensic science. They were not competent to spell out their own opinions/comments or hypothesis on the basis of the inconclusive data mentioned in the post mortem reports. It seems in publishing their opinion/comment in question with such abandon and alacrity at a stage when the investigation had just commenced, the reporters' investigative zeal, spurred by a not-very-healthy curiosity, outran their discretion, and they arrogated to themselves the functions of the investigating police and the forensic expert and of the court which alone was competent to give a judicial finding on such controversial technical issues, if and when the accused would be arrested and put up for trial.

- (vi) It is a fundamental principle that opinions of forensic experts only are admissible to

aid the court in reaching a finding on a matter relating to forensic science. Even the opinion of the expert may not conclude the issue. Such opinion has to be tested by the court in the light of other evidence on the record. In the instant cases, the opinion hazarded by the newspapers in the impugned publications has been sharply refuted by Dr Parikh, a well-known expert in forensic science.

- (vii) The publication of the impugned reports/comments impinges upon the personal privacy of the murdered nuns and tends to injure their reputation and dignity. The unethicallity of the impugned publications has to be viewed in the context that the dead women are unable to defend themselves against these calumnious imputations. The publication of these embarrassing and disparaging comments about the murdered nuns was bound to cause distress to their kin, surviving associates and all those belonging to the Catholic Christian faith engaged in running the

Snehasadan institution.

(viii) Publication of the impugned story/comments at this stage of the police investigation did not serve any overriding public interest. On the contrary, it could harm and prejudice a fair and unbiased police investigation. That it had actually caused confusion in the investigation was a fact which had been admitted by the Times of India itself in its written statement.

11.23 Describing the impugned reports as the product of an overwhelming curiosity rather than of an overriding public interest, the Council said the reporters did not act with due care and attention and it could not be justified as 'fair comment' published in good faith, notwithstanding that the respondents had no malicious motive or deliberate intention to malign the deceased or their institution. It was also held that by publishing the names of the victims, the newspapers had committed a gross violation of the recognised norm of journalistic ethics which requires that while reporting crime involving rape or molestation of women, or raising doubts and questions

touching the chastity, personal character and privacy of the women, the names, photographs of the victims or other particulars leading to their identity, especially at the police investigation stage, should not be published.²⁸

11.24 Elaborating the guidelines, the Council further said:²⁹

"Public interest' which may justify publication of, or inquiries into a matter within the preserve of personal privacy, must be legitimate public interest and not a prurient or morbid curiosity. 'Of interest to the public' is not synonymous with 'in the public interest'.

²⁸. Section 228A, inserted in the Indian Penal Code in 1983, prohibits the publication of the name or any matter which may make known the identity of any person against whom rape or a cognate offence is alleged or found to have been committed. The Supreme Court in the Nakkheeran case, supra note 19, further made this point clear by declaring that in the interests of decency, as stated in Art 19(2) of the Constitution, a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in the press/media. This rule, based on the right to privacy, is an exception to the right of publication based upon public records including court records.

²⁹. 1991-92 Annual Report 382-384, Ch VIII.

"The purely personal and family or social life of a public figure can legitimately be open to public scrutiny where (a) the private conduct of the individual including his state of mind/health can adversely affect or influence the proper discharge of his public functions; and (b) he may be setting a bad example when seen as a role model by others.

"Rape and molestation of women, sexual abuse of children etc are fit cases where privacy should be respected and the names, photographs or other particulars leading to the identity of the victims, or sordid details of the offence should not be publicised. Sensation or a morbid curiosity cannot be a just ground for invasion of privacy at the cost of causing added hurt and trauma to the victims. No public purpose is served, whereas the publicity may bring social opprobrium and shame to the individuals concerned and social embarrassment to their family and friends, community or to the organisation to which they belong."

11.25 This view was again reiterated in a decision rendered on 31 March 1993 when the Council found seven Kerala newspapers guilty of transgressing the ethical norms of journalism and the guidelines issued by the

Council by publishing the names and photographs of three missing girls. Pointing out that certain vulnerable categories require added protection in the matter of privacy, the Council said women and children belonged to this category. Rape and molestation of women, sexual abuse of children etc are fit cases where privacy should be respected and the names, photographs or other particulars leading to the identity of the victims, or sordid details of the offence, should not be published to those unconcerned with law enforcement or with administrative jurisdiction in the matter.³⁰

11.26 The Council reminds journalists to bear in mind that 'public interest' which may justify publication of a matter within the preserve of personal privacy must be a legitimate interest and not a prurient or morbid curiosity. On the basis of several letters received from people of Indian origin settled in the United States, the Press Council set up a committee to examine the alleged unethical and unprofessional behaviour of sections of the Indian press with regard to the rights of individuals infected by the AIDS virus. While conceding the right of

³⁰. K C John v. Deepika, Manqalam, Deshabhimani, Malayala Manorama, Kerala Kaumudi, Mathrubhumi and Indian Express. (1992-93) Ann. Rep. 231-235.

journalists and journals to write about people in terms of human interest, the Council, on the basis of the report submitted by the committee, advised the media to respect the right to privacy of AIDS patients and not subject them to needless exposure and social stigma. "Every mass medium," the Council said, "must observe the terms of the Final Document of the July 1989 International Consultation on AIDS and Human Rights, and promptly report the violation of such rights protecting the basic human rights to life and liberty, privacy and freedom of movement."³¹

11.27 The latest device by the British Government to discipline the press is the Heritage Committee's report on privacy which has proposed an alternative to the statutory regime recommended by Sir David Calcutt.³² The Heritage Minister, Mr Brooke, has suggested less harsh measures than proposed by Sir David. Its main recommendations are that there should be a Press Ombudsman, preferably a retired judge, appointed by the Lord Chancellor whose duties should be

³¹. (1992-93) Ann. Rep. 653-656.

³². A bill requiring the press to act responsibly cleared a big hurdle when it was given a second reading in the House of Commons in January 1993 despite government reservations. The further fate of the bill is not known at the time of writing.

to examine a proprietor's responsibilities for the newspapers he controls.³³ He would also investigate complaints about newspaper stories and insist on corrections. If necessary, he would supervise their wording and placement and publish adjudications. He could order compensation to be paid and if a newspaper persistently breached the code of practice he could fine it without jeopardising possible legal proceedings.

³³. The Times of India made the first attempt by any newspaper in the country to ensure cost-free redress for the readers when it appointed Mr F N Bhagwati, the former Chief Justice of India, as Ombudsman in 1989. According to the newspaper, the purpose of establishing the institution is to create a forum for the speedy redress of readers' complaints and to ensure objectivity, accuracy, balance and fairness in reporting and comment. The report of the Ombudsman on his opinion and finding is published by the newspaper regularly.

Chapter 12

RIGHT TO KNOW AND RIGHT TO REPLY

The Official Secrets Act is not to protect secrets but to protect officials.

Jonathan Lynn and Antony Jay¹

12.1 With the landmark decision of the Supreme Court in the Life Insurance Corporation case,² confirming a Gujarat decision,³ the people's right to know has been elevated to the status of a constitutional right. Though the judgment was only on the peculiar facts of the case without laying down any absolute proposition, it was the first time the Supreme Court was trying to resolve the conflict between the freedoms of the press and speech. Implicit in the court's judgment is the recognition sub silentio of the right of reply without specifically dealing with its scope and dimension in the context of the guarantee of

¹. Yes Minister, 1981, ch.7.

². Life Insurance Corporation of India v. Manubhai D Shah, A.I.R. 1993 S.C. 171.

³. Prof Manubhai Shah v. Life Insurance Corporation of India, A.I.R. 1981 Guj 15.

freedom of speech and expression.⁴

12.2 The case arose following the refusal of the Life Insurance Corporation to publish a rejoinder sent by Prof Manubhai Shah, executive trustee of the Consumer Education and Research Centre, Ahmedabad, in justification of his study paper exposing the discriminatory practices of the Corporation in its magazine Yogakshema. The study paper entitled "A Fraud on Policy Holders - a shocking story" was first published in The Hindu. The newspaper also published a counter written by a Director of the Corporation and a rejoinder to it sent by the author of the study paper. Subsequently, the Yogakshema carried the counter alone without publishing either the study paper or the rejoinder.

12.3 Though the Corporation claimed editorial privilege, which undoubtedly is part of the freedom of expression, the refusal to publish the rejoinder was characterised as both unfair and unreasonable: unfair because fairness demanded that both viewpoints were placed before the readers to enable them to draw their own conclusions; and unreasonable because there was no

⁴. Soli J Sorabjee, Indian Express, 15 August 1992.

logic or proper justification for refusing publication. The Corporation was compelled to publish views which it does not like as a means for achieving "balanced presentation" - an alternative remedy in the United States for defamation.

12.4 There is statutory recognition of this right from the very beginning as far as the Press Council of India is concerned. As per section 14(1) of the Press Council of India Act, non-publication of a relevant matter can be objectionable and may be construed as a professional misconduct. As per Regulation 3(1)(c) of the Press Council (Procedure for Inquiry) Regulations, a complainant has to draw the attention of the newspaper, news agency, editor or other working journalist concerned to the non-publication of the matter along with the complaint. The Council itself has power, vide section 14(2) of the Act, to require any newspaper to publish any particulars relating to an inquiry.

12.5 At the same time the Council is recognising editorial privilege as part of the freedom of expression. No newspaper is bound to publish each and every article, letter, news item, or picture sent to it

for publication; the editor has the right to choose the material, keeping in view its suitability. The editor has the discretion to edit the matter without any distortion.⁵ This discretion should be exercised in a fair and objective way.⁶ In the Onlooker/Arun Shourie case of 1984, the Council reiterated the public's right to reply. The Council had, in many of its adjudications, held that an editor/publisher who assails a person or his work ought to publish the reply of the person, should he send one. In the instant case articles were published in the Onlooker attacking Arun Shourie's work and raising grave doubts about his professional competence. The editor of Onlooker stated that he also endorsed the view that every person who had been adversely commented upon in any publication had a right of reply and in the instant case he was compelled to make an exception for the reason that the issue had by then become sub judice. The Press Council, however, was of the view that the magazine ought to have published the reply; but in the absence of any ostensible mala fide on the part of the editor, the matter was allowed to rest there.

⁵. Andhra Patrika and Bharati/T Ramalingeshwara Rao, a case decided by the Press Council in 1968.

⁶. The Hindu/Romila Thaper and Bipin Chandra, 1980. Nagrik Weekly/Purna Narayan Sinha, 1980.

12.6 The right of reply is a limited right limited only to reply to anything damaging that has already been written. Parochial writing being the essence of freedom of expression, real balance in the presentation of news and views is not possible. It can only be an artificial fairness or balance. Balancing out viewpoints for the sake of an artificial fairness can pose the problem, at times, of having to balance the views of Jesus Christ with those of Judas Iscariot.⁷

In journalism, it is not so much what you cover which is important as what you do not cover. The decision to omit is often as important as the decision to commit.⁸

12.7 The Tornillo⁹ case in the United States will illustrate this point. The validity of a Florida right of reply statute was in issue. The Miami Herald argued that the statute, by requiring a newspaper to grant political candidates a right to equal space in order to answer such newspaper's criticism, violated the freedom of the press guarantee. In invalidating the statute,

⁷. See David Halberstam, The Powers That Be (1979):60.

⁸. Ibid at p. 202.

⁹. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

the United States Supreme Court invoked two arguments: First, it thought that a right of reply would induce editors to shun controversy with the result that vigorous public debate would be diminished; second, enforced access would intrude into editorial function, in other words, that a governmental direction what to print was as incompatible with the constitutionally guaranteed freedom of the press as a censor's direction of what not to print. Chief Justice Burger, speaking for the court, stated that "compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case". With the issue thus characterised, the court had no difficulty in concluding that the right of reply statute¹⁰ was violative of the freedom of the press guarantee.

12.8 The Press Council's insistence on the right to reply is justifiably confined to persons who are aggrieved by a publication. The elevation of such a restricted right to the status of a general right will

¹⁰. Only three American states - Florida, Mississippi and Nevada - had adopted right of reply statutes. The Nevada statute was repealed prior to the Tornillo case. See Veena Bakshi, "Right to Reply: A Dissonant Note in the System of Freedom of Expression - Perspectives on the Yogakshema case," (1982) 1 SCC (Journal) 1.

result in chaos and confusion, eroding the credibility of newspapers and intruding into the independence of the editor. At the same time, the inclusion of such a right as part of a voluntary code of ethics is a different matter. The First Press Commission wanted such a principle to be included in a code of journalistic ethics which was incorporated almost verbatim by the All-India Newspaper Editors' Conference in the Code of Ethics for Editors adopted by it.¹¹

12.9 The rationale of the editor's obligation to publish the reply/rejoinder of the aggrieved person, according to Justice R S Sarkaria, former Chairman of the Press Council of India, follows as a necessary corollary from the axiom that the freedom of the press (which is a part of the freedom of speech and

¹¹. The principle proposed by the Press Commission: Any report found to be inaccurate and any comment based on inaccurate reports shall be voluntarily rectified. It shall be obligatory to give fair publicity to a correction or contradiction when a report published is false or inaccurate in material particulars.

Clause 4 in the Code of Ethics for Editors adopted by the standing committee of the All-India Newspaper Editors' Conference in May 1983 at Baroda says: Any report found to be inaccurate and any comment on inaccurate reports shall be voluntarily rectified. It should be obligatory to give fair publicity to a correction or contradiction when a report published is shown to be false or inaccurate in material particulars.

expression), is not so much a right of the newspaper's publisher, reporter, or editor as of the public to know and be informed, from antagonistic sources, of all sides of an issue of public interest.¹²

12.10 The right to reply is guaranteed by Article 14(1) of the American Convention on Human Rights which says:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication outlet, under such conditions as the law may establish.

12.11 The Inter-American Court of Human Rights in its advisory opinion of 29 August 1986, given at the request of the Government of Costa Rica, fully examined the ambit of Article 14(1) and observed:

In the individual dimension, the right of reply or correction guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his views and thoughts about the injurious statements. In

¹². Sarkaria, PCI Review, 1/93.

the social dimension, the right of reply or correction gives every person in the community the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements. In this manner, the right of reply or correction permits the reestablishment of a balance of information, an element which is necessary to the formation of a true and correct public opinion. The formation of public opinion based on true information is indispensable to the existence of a vital democratic society.

12.12 The importance of these observations, as pointed out by Mr Soli Sorabjee,¹³ lies in their emphasis on the social dimension or the public aspect of the right of reply. It is not just an alternative remedy for defamation. It is a natural sequence of the people's right to know.

12.13 When Mr V N Gadgil, the Congress-I spokesman, attempted to create a statutory right of reply for the public vis-a-vis the press by moving the Press Bill 1994 in the Rajya Sabha, the same was referred to the Press Council by the Information and Broadcasting Ministry. The Council was of the view that the proposed legislation was vulnerable from the standpoints of its necessity, propriety, viability, workability, and above all, its constitutional validity. Describing the concept of a right of reply as

¹³. Supra, note 3.

essentially an ethical issue, the Council said in a press release¹⁴ that it has, through its adjudications, firmly established the norm of journalistic ethics, that the editor of a newspaper shall promptly and with due prominence, publish, free of cost, at the instance of a person affected or feeling aggrieved or concerned by a publication in the newspaper, his contradiction/reply/clarification or rejoinder, sent to the editor in the form of a note or a letter.

12.14 The Council feels that aberrations from this norm are not so widespread and endemic as to require suppression with punitive sanctions by law as contemplated in the Bill. Pointing out that the proposed legislation has a tendency to stifle investigative journalism, the Council said it would undermine the exercise of editorial direction, control and judgment as to the choice of the material and the decisions about the size and content of the newspaper and the treatment of public issues, public officials and politicians. The proposed legislation, according to the Council, has a potential for doing more harm to public interest than the stray lapses on the part of

¹⁴. Indian Communicator, Kochi, 7 July 1994.

newspapers to publish the reply of an individual affected by the report. Clauses 4 and 5 of the Bill requiring the concerned newspaper to print the reply of equal length of the report replied to, on the same page, at the same position and in the same type, within three days of the receipt, and clause 6 requiring the Council to appoint a panel to determine within ten days, whether or not sufficient grounds exist for meeting a demand for publication of the reply, were too procrustean, unrealistic, impracticable and unworkable. When Mr Gadgil withdrew his controversial Bill, it was a triumph for the Press Council.

12.15 In keeping with the spirit of the Universal Declaration of 1948, the Preamble of the Constitution of India embodies a solemn resolve of its people to secure, inter alia, to its citizens, liberty of thought and expression. And it is not a mere coincidence that the number of the Article dealing with liberty of thought and expression in both the documents is the same.¹⁵ However, the word information is

¹⁵. Article 19, Universal Declaration of Human Rights (1948): Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

Article 19(1)(a), Constitution of India

conspicuously absent in our Constitution.

12.16 India was a member of the Commission on Human Rights appointed by the Economic and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information also was included in the rights enumerated and guaranteed under Article 19 of our Constitution. Article 55 of the United Nations Charter stipulates that the United Nations "shall promote respect for, and observance of, human rights and fundamental freedoms" and according to Article 56 "all members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55."

12.17 Information is essential for acquiring knowledge and skill which are absolutely necessary for the proper and effective exercise and enjoyment of the fundamental right of freedom of speech and expression. Depriving an individual of the right to information will have the deleterious effect of denial to that

(1949): All citizens shall have the right to freedom of speech and expression.

individual of his fundamental right of freedom of speech and expression. However, problems arise in enforcing this right against the State and public bodies. The executive branch of the government, unlike the other two organs, often tends to cloak its operations in secrecy. It will not be possible for any citizen to play his responsible role of making government institutions accountable unless he is privy to necessary information. Public discussion is a political duty; a discussion can only be on the basis of information; a well-informed citizen is the sine qua non for the success of a democracy.

12.18 Maintaining a law similar to the Official Secrets Act of Great Britain which clearly establishes the principle of secrecy in government, the state is stifling the people's constitutional right to know. The Indian Official Secrets Act was enacted in 1923 and it is still in service in the constitutional era to muzzle free speech. The Act was unsheathed against a newspaper in free India for the first time in 1987 when Indian Express exposed a corporate fraud, quoting extensively from government files. That file did not have even a remote connection with national security. There was only one prosecution during 1931 to 1946 throughout the

whole of India¹⁶ and there has been hardly any reported High Court or Supreme Court case involving prosecution of the press under the Act.

12.19 Access to government information is a privilege which fosters understanding and communication between the government and the governed and helps to strengthen democracy. The Press Council has recommended the amendment of section 5 of the Official Secrets Act, permitting disclosures if it predominantly and substantially subserves the public interest.

12.20 Negating the Government's claim of privilege, the Supreme Court said in State of U.P. v. Raj Narain:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor

¹⁶. Report of the Press Commission (1954), at 401.

which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.¹⁷

12.21 These observations of Justice K K Mathew were elevated to the status of a constitutional dicta when the Supreme Court in "the Judges Case"¹⁸ called for an open government with the observation that "an open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception". Delivering the majority judgment, Justice P N Bhagwati said:

The citizen's right to know the facts, the true facts about the administration of the country is thus one of the pillars of a democratic state... but, this important role of the people can be fulfilled in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government... The concept of open government is a direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed

¹⁷. A.I.R. 1975 S.C. 865.

¹⁸. S P Gupta v. Union of India, A.I.R. 1982 S.C. 147.

under Article 19(1)(a).¹⁹

12.22 Justice E S Venkataramiah appears to be in agreement with this hypothesis when he pointed out in the Indian Express Newspapers v. Union of India that freedom of expression has four special purposes to serve:

i. It helps an individual to attain self-fulfilment;

ii. It assists in the discovery of truth;

iii. It strengthens the capacity of an individual in participating in decision-making; and

iv. It provides mechanism by which it would be possible to maintain a reasonable balance between society and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle here is the right to know.

12.23 The right to know as a basic right was again highlighted by the Supreme Court when it rejected a plea made by the Reliance Petrochemicals Ltd to restrain Indian Express from publishing any article,

¹⁹. Ibid. at p. 234.

comment or report questioning the legality of the issue of convertible debentures by the company. Vacating the orders of injunction, the court said the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy.²⁰

12.24 Just as the Supreme Court had ushered in the right to privacy by a liberal interpretation of Article 21 of the Constitution, the right to know and the right of access to information were elevated to the status of a fundamental right by a generous interpretation of Article 19(1)(a). The willingness of the court to accept jurisdiction on broad constitutional issues seems to be extending. It is based on the principle that certain unarticulated rights are immanent and implicit in the enumerated guarantees. And it is on this basis that we are demanding a legislation

²⁰. Reliance Petrochemicals Ltd v. Indian Express, A.I.R. 1989 S.C. 190. However, in 1995, it was the turn of Indian Express to approach the Bombay High Court to restrain Magna Publishing Ltd from writing, publishing or republishing any article alleging that the Indian Express Newspapers Ltd., Bombay, was selling or transferring ownership and control of the newspaper to Australian media tycoon, Mr Rupert Murdoch. Such an article had appeared in the May 1995 edition of Island, a magazine published by the respondent. The restraint order was granted, both the court and the petitioner oblivious of the arguments raised in the Reliance case.

guaranteeing freedom of information.

12.25 Sweden was the first country to grant to its people the right of access to government information in 1812.²¹ Finland, Denmark, Norway, Austria, France and Canada have enacted similar legislation providing access to official information. In India, a noteworthy feature of the National Front's election manifesto in 1989 was the promise to amend the Constitution to incorporate the right to information as a fundamental right. That promise did not materialise; nor the attempt made by Mr Ramakrishna Hegde during his tenure as Chief Minister of Karnataka to enact the Karnataka Freedom of the Press Bill, 1988. The Bill had drawn on the exceptions listed by the Press Council of India in its recommendations for amending section 5 of the

²¹. See Campbell, Public Access to Government Documents, 41 Aust. L.J. 73 (1967-68). There is a large literature pleading for openness in the government. For instance, see the collection of papers by different authors in T N Chaturvedi, (ed.) Secrecy in Government (1980); Report of the Franks Committee on Section 2 of the Official Secrets Act 1911 (1972); Galnoor, Government Secrecy in Democracies (1977); Rowat, Administrative Secrecy in Developed Countries (1979). Rowat says that Sweden's long experience with the right of public access "indicates that it changes the whole spirit in which public business is conducted. It gives public debate a more solid foundation, causes a decline in suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence."

Official Secrets Act and on the recommendations of the Second Press Commission which approvingly cite the British Freedom of Information Bill, 1979, as amended. In the 1996 manifesto the Janata Dal again promised to make right to information a fundamental right with drastic revision of the Official Secrets Act.

12.26 In the United States, the First Amendment protects the right to receive information and ideas. As pointed out by the Supreme Court in Kleindiest v. Mandel, the First Amendment preserves "an uninhibited marketplace of ideas in which truth will ultimately prevail... It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences". Keeping this in view, the United States enacted the Freedom of Information Act to "clarify and protect the right of the public to information".¹⁹ Adopted in 1966 and extensively amended in 1974, 1976 and 1983, the Act established the enforceable right of any person to have access to information concerning the federal government, notwithstanding the existence of any special interest in the information by the government. Nine exceptions

¹⁹. Article on the United States by Michael J Singer in Rowat (ed.), Administrative Secrecy in Developed Countries 343 (1979).

to this blanket obligation are set forth in the statute, touching on national defence, foreign policy, individual privacy etc. When disclosure is denied, an administrative appeal is provided which is subject to judicial review. The burden of proof is on the agency to demonstrate that the information requested is within the terms of a particular exemption. The Act has been used by the press, corporations and lawyers as a discovery tool for litigation purposes.

12.27 In Britain, the Franks Committee was set up in 1977 to investigate the reform of the Official Secrets Act after all defendants were spectacularly acquitted in the historic Biafran secrets case involving the Sunday Telegraph. Calling for a wider diffusion of information, the Committee said:

A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It cannot use the plea of secrecy to

hide from the people its basic aims. It must provide the justification for them, and give the facts both for and against a selected course of action. Nor must such information be provided only at one level and through one means of communication. A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper function requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result, matters will be revealed when they ought to remain secret in the interest of the nation.²⁰

12.28 This is exactly what has happened and is happening in our country. The situation can be improved only by an appropriate legislation conferring on the people and the press the right to information.

12.29 This does not mean naked exposure of every limb of the body politic to public gaze. The demand for

²⁰. Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (1972).

the removal of the purdah does imply that the body shall be decently covered. Let the veil of the burka be gently lifted in the open breeze as the body is covered in the black sheath of secrecy. Just as the right to freedom of speech and expression is subject to reasonable restrictions, the right to information can also be controlled and curtailed in the national interest and for preservation and protection of individual privacy and other cherished private rights of individuals.

12.30 The 1948 Universal Declaration, while projecting right to information as a human right, also provides that it can be subject to certain restrictions. This shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals.²⁰

12.31 The U.N. Declaration had a catalytic effect on movements for 'open government' world over. Close on the heels of the British and American willingness to take legislative action to give its citizens right of

²⁰. Article 29(2).

access to information, Canada and Australia enacted Access to Information Act in 1982. New Zealand also passed similar legislation in 1983.

12.32 A survey of freedom-of-information laws passed in various countries would reveal that the right of access to information conferred thereby on the citizens is not unfettered. It is subject to several exemptions/exceptions indicated in broad terms. Generally, the exemptions/exceptions under those laws entitle the government to withhold information relating to the following matter:

1. International relations.
2. National security (including defence) and public safety.
3. Investigation, detection and prevention of crime.
4. Internal deliberations of the government.
5. Information received in confidence from a source outside the government.
6. Information, which, if disclosed, would violate the privacy of an individual.
7. Information of an economic nature (including trade secrets) which, if disclosed would

confer an unfair advantage on some person or concern, or subject some person or government to an unfair disadvantage.

8. Information which is subject to a claim of legal professional privilege, e.g., communication between a legal adviser and his client; between a physician and the patient.

9. Information about scientific discoveries.

12.33 With the promise of the National front in its 1989 election manifesto to amend the Constitution to incorporate the right to information with drastic revision of the Official Secrets Act and the reiteration made in the 1996 Janata Dal manifesto, renewed interest in the area was generated. Though seminars and discussions were held in various fora and the media, there were variations in approach, perception, priorities and methods of achieving that object and tackling the related issues, namely:

i. Whether it is necessary to amend the Constitution to secure the right to information;

ii. Whether the object of securing this right can be adequately achieved by amending, revising or repealing the whole or part of the Official Secrets

Act, 1923, and similar laws, such as those contained in sections 123 and 124 of the Evidence Act, Post and Telegraph Act, Customs Act etc.? If so to what extent the amendments of the Official Secrets Act can be modelled after the British Official Secrets Act, 1989?

iii. If the object cannot be adequately achieved, whether it is necessary to enact simultaneously a Freedom of Information Act. If so, what model, if any, should be adopted for that purpose?

12.34 For the answers, it will suffice to extract from a speech delivered by Justice R S Sarkaria, former Chairman of the Press Council, at a seminar in New Delhi on 5 December 1992:

Issue No.1 # The preponderant view held by eminent jurists, scholars and knowledgeable persons is that the right of access to government-held information is included in the fundamental freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. This view receives support from the observations of the Supreme Court, reiterated in several decisions and is therefore entitled to respect. It is therefore respectfully submitted that there is no pressing necessity to amend the Constitution for

securing to the citizens a right to information. This right, to my mind, is comprehended by the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.

Issue No.2 # India stands committed to 'open government'. The antiquated Official Secrets Act, particularly its section 5 and other allied provisions, need repeal and replacement by far more liberal provisions which would bring it in tune with Article 19(1)(a) and (2). Perhaps, it will be useful to adopt, with necessary changes and adaptations to peculiar Indian conditions, those provisions of the British Official Secrets Act, 1989 - minus its regressive features - which represents a substantial advance towards open government and freedom of access to information. Several archaic provisions in other statutes such as those contained in sections 123 and 124 of the Evidence Act will accordingly need suitable revision, replacement or repeal.

Issue No.3 # If suggestions relating to issue number 2 are adopted, there will remain no imperative exigency of enacting a Right to Information Act on the lines of America's Freedom of Information Act. There is

need for caution in taking up such legislation. All is not well with the working of the US Act. It has been misused and subverted by anti-socials for pernicious purposes. In this context, the observations of Justice H R Khanna, an eminent jurist and a former Judge of the apex court, are pertinent:

Though provisions of the Act were used more often by business organisations seeking information regarding their competitors, criminals also made frequent use of those provisions with a view to securing information from law enforcement files about those who incriminated them. They also use it to try to avoid prosecution. The Director of Federal Bureau of Investigation in a lengthy testimony before the Congress recited numerous examples of the perverse effects of the use of the provisions of the Act. The Drug Enforcement Administration also reported many cases of its investigations having been aborted because of information derived by those violating the provisions of the Food and Drug Administration Law. The New York Bar Association in 1979 bemoaned the fact that the provisions of the Act were used as a carte blanche for unrestricted access to otherwise non-public information

submitted by private citizens and business. It pointed out that ever-increasing plenitude of reports and information from the private sector has made the Federal Government's files a virtual treasury of valuable and sensitive information about private citizens and businesses.

12.35 The aforesaid issues/proposals for legislative reforms were also considered by the Press Council of India on a reference made to it in March 1990 by the Central Government. The views/comments of the Council were communicated to the Government in July 1990. So far, no action has been taken for bringing out the proposed legislative changes.

WHAT IS CONFIDENTIAL?

12.36 Any type of information, whether conveyed orally or preserved in writing, can be confidential. It may seem obvious to say that to be confidential information must be secret since that is the whole idea of confidence. Whether, and at what point, the publication of once-secret information, destroys its confidentiality creates problems. The English court is faced with difficulties if asked to stop publication of

material which has been published abroad. The English law of confidence is very different to the law of other countries, notably the United States, where prior restraint of publication in the media is forbidden. The history of Spycatcher litigation shows what a fiasco the law of confidence can produce. In Attorney General v. Observer, Guardian (1988) injunctions were ordered in June 1986 preventing newspapers from publishing allegations made by former senior MI-5 officer, Peter Wright, in his memoirs, Spycatcher²¹. In June 1987 the House of Lords, by a three to two majority, ordered the continuation of those injunctions, although by that time the whole Spycatcher book had been published in the United States, and the major allegations in the book had been reported by the British press and

²¹. Peter Wright, whose 1987 tell-all autobiography, Spycatcher, touched off a furor with its claims that Soviet spies had infiltrated British intelligence services, had worked as a British counterintelligence officer for 20 years. He wrote Spycatcher after leaving the service, frustrated that his suspicions about Soviet penetration had been ignored by senior officials. When the book appeared, it was banned in Britain; the British government also sought unsuccessfully to ban it in Australia, where Wright lived. While debate raged over his betrayal of British intelligence secrets and the truth or falsity of his allegations, Spycatcher became a best seller, making its author a millionaire. See P. Wright, Spycatcher (New York: Viking, 1987); on the efforts of the Thatcher government to block publication, see M. Turnbull, The Spycatcher Trial (London: Heinemann, 1988)

television, and the media worldwide. By the time the case reached trial Spycatcher was being published in America (where it had topped the bestseller lists for ten weeks), Canada, Australia and Ireland, and was available throughout Europe. It could be imported freely into Britain. Both the trial judge (in November 1987) and the Court of Appeal (in January 1988) decided that an injunction should not be ordered against the newspapers, largely because of the book's widespread distribution. However, the injunctions were continued pending an appeal to the House of Lords.

12.37 The principle that disclosure of cabinet secrets can be restrained by injunction has been recognised in England in the Crossman Diaries case, in which the Attorney General sought orders preventing the Sunday Times and book publishers from publishing some of the diaries of the late Richard Crossman relating to his tenure as a Cabinet Minister.²² A member of the Cabinet owes a duty of confidence to other members of the Government. The Government applied to prevent publication of the diaries mainly on public interest grounds. Publication would deter cabinet discussions from having the frankness they needed for the effective running of government. The court refused an

²². Attorney General v. Jonathan Cape Ltd, (1975) 3 W.L.R. 606.

injunction - the information was several years old.

12.38 In 1995 when the Sunday Times and a book publisher, Harper Collins, tried to get the courts to stop the Daily Mirror from publishing what they called "purloined" material, they decided to argue on the wider issue of breach of confidence. The allegation was that the Mirror had paid a substantial amount for a stolen copy of Thatcher memoirs scheduled to be published solely in the Sunday Times under an arrangement with Lady Thatcher and her publisher, Harper Collins. The court, however, rejected the contention on grounds of public interest. They held that the political content of the material was such that the public was "entitled to have it placed before it at the earliest available opportunity, and particularly during a period of time when much public political interest will be focussed on the activities of the Conservative party in Blackpool". The decision was upheld on appeal, with the judge holding that the material was not confidential in the sense that the public was never intended to learn of it. Rather, it was material which the publisher and the Times newspapers had an obvious commercial interest in keeping confidential until the start of the exclusive serialisation by the latter.

Chapter 13

OBSCENITY, HARMFUL PUBLICATIONS

13.1 The law of obscenity is one of the most controversial, the most ambiguous and the least understood of the laws affecting freedom of expression. The problem is the difficulty in reaching any sort of consensus about which words or images are so harmful to society that their production and distribution should be punishable under the criminal law. Attitudes are bound to differ greatly between people of different age, class and creed.

13.2 Despite this there have been prosecutions aimed at the publication of obscene matter for well over two centuries. The test applied in such cases was formulated by Lord Chief Justice Cockburn in R v.

Hicklin:¹

...whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

13.3 The Hicklin case continued to influence obscenity convictions in America as well. In 1870 Walt Whitman was dismissed from his government position for writing his famous book Leaves of Grass. The campaign against obscenity at that time was led by an American YMCA member, Anthony Comstock. The Congress in 1873 passed a bill banning possession, printing and selling of obscene literature and posting them by mail. The maximum penalty was a jail term for 10 years or a fine of \$5,000 or both. The bill was named after Comstock who was also appointed a special anti-obscenity agent of the State.

13.4 Though there was little protest against Comstock's tactics by the major American press, a relentless struggle slowly gathered momentum under the leadership of a literary outlaw, Samuel Roth. It was

¹. (1868) 3 QB 360. It evolved out of the prosecution of a pamphlet describing how priests were often sexually aroused while hearing women's confessions.

Roth who first published James Joyce's Ulysses in 1930. It was only in 1933 that Ulysses was elevated from obscenity to art by the celebrated ruling of Federal Judge John M Woolsey. In 1930 Roth was imprisoned for 60 days for publishing Ulysses. After a series of prosecutions and convictions, it was Roth who challenged the Comstock Act of 1873 in the Supreme Court. Roth lost the case but it was due to the Roth judgment that the U.S. Supreme Court lifted the ban on Lady Chatterley's Lover and conceded that D H Lawrence was a man of genius. The ban was also lifted in England in 1960 following the decision of Justice Byrne.²

13.5 In India, the principal statutory provision on the subject of obscene publications is to be found in section 292 of the Indian Penal Code. Sub-section (2) of the section punishes a variety of acts concerning obscene publications and obscene objects. So far as journalists are concerned, the material provisions are to be found in clauses (a) and (d) of that sub-section.

13.6 The first book to attract official wrath was

². R v. Penguin Books Ltd (1960), cited in Tom G Crone, Law and the Media (Oxford: Heinemann Professional Publishing, 1989), 150.

Vladimir Nabakov's Lolita which was brought to India by Jaico Publishing House in 1959. Though four editors - Frank Moraes of Indian Express, N J Nanporia of Times of India, R K Karanjia of Elitz and D F Karaka of Current - said that Lolita was not obscene, the authorities refused to release the book. It was only after the intervention of the Vice President, Dr S Radhakrishnan, who convinced Prime Minister Nehru that it was not obscene, that the book was allowed to be distributed in India.

13.7 Lady Chatterley's Lover was less fortunate. Ranjit Udeshi and his three partners were arrested on 12 December 1959 under section 292 of the Indian Penal Code for selling the book. The lower court decided the case against the accused which was upheld by the High Court. The case was finally heard by the Supreme Court which unanimously held that the book was satisfying the tests of obscenity.³ Considering Hicklin, Roth and other American cases up to 1963, the Supreme Court observed:

Today our national and regional languages
are strengthening themselves by new literary

³. Ranjit Udeshi v. State of Maharashtra, A.I.R. 1965 S.C. 881.

standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support.

Commenting on the book, the Court concluded:

There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything is said in its favour we find that in treating with sex, the impugned portions viewed separately and also in the setting of the whole book, pass the permissible limits judged from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the tests of obscenity.

13.8 It is interesting to note that when the unanimous decision of the five judges was delivered by Justice M Hidayatullah, who has shaped, masterfully, the enunciation of many a constitutional principle, the ban on Lady Chatterley's Lover had already been lifted both in the United States and England. Further, in

Redrup⁴, the U.S. Supreme Court suggested that the court cannot and should not be the nation's literary arbitrator, a task for which it admittedly had neither the time nor the talent.

13.9 Indian courts took a conventional view of obscenity in literature, particularly after the Supreme Court judgment in 1965 banning Lady Chatterley's Lover as obscene. It took two decades for the Supreme Court to come out of the cocoon of conventional views that were being taken by all the courts in India after Justice Hidayatullah's judgment. Reversing the judgment of the Calcutta High Court holding Frajapati, a novel written by Samaresh Bose and published in the Bengali magazine Desh, as obscene, the Supreme Court said in 1986 that books containing any reference to kissing, description of the female body and suggestions of acts of sex by themselves may not have a depraving effect and on these counts may not be considered obscene.

13.10 Notwithstanding these developments, section 292 of the Indian Penal Code has survived every attack

⁴. Redrup v. New York, 386 U.S. 767 (1967). The court created a new verb, to Redrup: defined as reversing an obscenity conviction without providing any reason. Thirty-one cases were Redrupped.

on its constitutional validity, and the Supreme Court has held that it imposes a reasonable restriction on the freedom of speech and expression in the interest of decency or morality as permitted by Article 19(2) of the Constitution. The Supreme Court did not define obscenity, but made the following observations on the subject:

In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our fundamental law), judged by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds must determine the result. We need not attempt to bowdlerise all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality. When the latter is substantially transgressed, the former must give way.⁵

⁵. Ranjit D Udeshi v. The State of Maharashtra, op. cit. In Samuel Roth v. United States of America, op. cit., Justice Hugo L Black agreed with Justice William O Douglas that even pornography was protected by the First Amendment and added that "the test that suppresses a cheap tract today can suppress a literary gem tomorrow". The five other Justices, however, affirmed Roth's conviction saying that obscenity like libel was not protected by the First Amendment.

Obscenity and Bad Taste: Principles laid down by the Council

13.11 The problems of agreeing upon what constitutes obscenity remain and enforcement is not easy. However, certain principles have been evolved by the Press Council as a result of the deliberations in its adjudications on complaints relating to obscenity and bad taste. Since "obscenity" as well as "taste" are not open to precise definition, the Council cannot lay down definite guidelines about them. On a complaint against Indian Observer,⁶ the Council found that the impugned story, dealing with the husband and wife in the privacy of their bed-chamber, was vulgar in the extreme and the worst of taste. Expressing its difficulty in laying down guidelines in the matter of obscenity and good taste, the Council observed that obscenity was defined by the courts interpreting section 292 of the Indian Penal Code or other relevant legislation. Good taste, on the contrary, is to be judged with reference to a concrete case and depends on

⁶. Delhi Administration v. Indian Observer, 1969 Ann. Rep. 33-34. The complaint alleged that Indian Observer published a story entitled "Tragedy of the Chastity Belt" which was grossly obscene and likely to arouse lustful desires and sexually deprave the reader's thoughts. The editor was warned against repetition of such writings.

the totality of the impression it leaves on the reader and so not capable of being defined.

13.12 Though incapable of a precise definition, 'taste,' according to the Council, is something which an editor can recognise. Holding that Confidential Adviser,⁷ by publishing certain articles under the guise of sex education, had violated the norms of journalistic ethics and public taste, the Council said it was undesirable to publish a matter if it had a tendency to stimulate sex feeling in a journal intended for the lay public - young and old. Journalists were reminded that appeals to the freedom of the press have no relevancy to such writing.

13.13 In a complaint against Jawani Diwani,⁸ the Council went beyond the question whether the nude and semi-nude pictures published by the Urdu monthly were obscene under section 292 IPC in the light of the test laid down by the Supreme Court in Chandrakant and Udeshi⁹ and held that the impugned pictures intended to

⁷. 1969 Ann. Rep. 50-52.

⁸. 1971 Ann. Rep. 55

⁹. Chandrakant v. State of Maharashtra, A.I.R. 1970 S.C. 1390; Udeshi v. State of Maharashtra, A.I.R. 1965 S.C. 881.

exploit sex-feelings for money fell below the norms of public taste. The question whether a publication was vulgar or offending against good taste was very different from the question whether it was obscene within the meaning of section 292 IPC. The Council's view was that in judging whether a picture fell below the standards of public taste, the environment, the milieu, as well as notions of taste prevailing in contemporary society were the factors to be taken into account.¹⁰ A picture is to be judged in relation to three tests:

i. if it can be said to be vulgar and indecent;

ii. if it can be described as merely a piece of pornography; or

iii. if it constitutes an "unwholesome exploitation of sex" so as to make money.

13.14 While adjudicating a complaint against Malayalanadu,¹¹ a Malayalam weekly from Kerala, the Council examined at length the legal position as to obscenity with reference to the decision of the Supreme

¹⁰. Case of Blitz, Statesman etc., 1972 Ann. Rep. 69-90.

¹¹. 1980 Ann. Rep. 125.

Court in Udeshi where the test formulated by Lord Chief justice Cockburn in Hicklin¹² was substantially accepted. Accepting the position, the Council held that in the instant case there was no tendency "to deprave and corrupt" which was the basic test. The scene depicted and the language used in the serialised novel could not be considered 'filthy', 'repulsive', 'dirty' or 'lewd' which the word obscene normally means in accordance with the dictionary definition. the Council said. Dehors the reputation of the author, it is the material which is judged to be obscene and it will depend upon such factors as the literary and cultural nature of the magazine and the social theme of the story.¹³

13.15 As pointed out by the Council in the case of Jawani Diwani, the relevancy of a picture to the subject matter of a magazine or newspaper has a bearing on the question whether the matter published falls below the standards of public taste. The Council said the claim of the editor that his magazine was engaged in research and reform on sex appeared to be meaningless. The impugned pictures served no purpose

¹². Supra note 1.

¹³. Case of Malayalanadu, supra note 11.

except to titillate and arouse prurient curiosity among adolescents. No aesthetic or art purpose was served by the display of nudity.¹⁴ It has a bearing also on the question of motivation, viz., "is it dirt for money's sake or is it intended to serve some purpose?" In the case of Blitz, the Council found that two pictures, one of a waitress in a Sydney bar showing her bare breasts and another titled "Home Comforts" showing a woman sitting on a divan with the upper part of her body completely bare, served no purpose and Blitz, being a serious publication, could have avoided it. In publishing the bare body of a woman, how much leeway is to be allowed will depend on the nature of the magazine. Thus, a journal, devoted to movies carrying stills from pictures exhibited in cinema houses, may be allowed greater freedom in the matter than a serious magazine. Accordingly it was found that the pictures

¹⁴. The impugned material appeared in four pages in one issue of the monthly. On two pages were drawings of women in black and white - two in reclining postures and one standing topless with a nominal covering at the waist. On another page was to be found a line drawing of two nude forms - one male and the other female, apparently in a sexual embrace, while on yet another page was a picture of a woman completely nude but holding a towel. The matter written on these pages had nothing to do with the pictures and was admittedly not intended to explain them in any way. Next month a nude woman particularly covering her breasts with her arms while another apparently sitting before a mirror wearing unbuttoned blouse that exposed her breasts were shown.

published in Cine Advance showing female forms with their busts somewhat prominently, but none of them completely nude or even totally topless, did not violate public taste. One of the relevant factors in judging whether the picture falls below the standard of public taste will be the purpose of the publication or the nature of the magazine - whether it relates to art, painting, medicine, research or reform of sex.

Alternative tests of obscenity

13.16 The definition of what is obscene, as given in section 292(1) of the Indian Penal Code, gives three alternative tests:

- i. lascivious matter; or
- ii. matter which appeals to the prurient interest; or
- iii. matter whose effect, or the effect of any one of whose items taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

13.17 The expression 'lascivious' indicates something which is extremely lewd. The element of

'prurient' appeal is obviously drawn from American Supreme Court decisions. The third alternative test, wherein the effect of the material would be 'to tend to deprave and corrupt,' is largely drawn from the formulation of the law in the Hicklin judgment which is the leading English case on the subject.

13.18 The prosecution of Lady Chatterley's Lover,¹⁵ which was the first major test case for the Obscene Publications Act 1959 in England, produced the authoritative working definition of these key words. According to Justice Byrne:

Deprave means to make morally bad, to pervert, to debase, to corrupt morally.

Corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile.

The test is stringent: it is not enough that the publication would simply shock or disgust, or even that a reader or viewer would be led morally astray.

¹⁵. Supra note 2.

13.19 The requirement of mens rea, i.e. guilty intention, which is an essential part of most offences under the criminal law is, for the most part, dispensed with in obscenity cases. The test for obscenity will be satisfied if the prosecution establishes the fact of publication and the effect of the published article. The intention of the author or publisher is irrelevant.¹⁶ The effect must be judged with reference to the class of likely readers.¹⁷ However, the exclusive emphasis on the effect of the publication, totally disregarding the author's intention, does not appear to be a satisfactory approach where one is concerned with criminal law.¹⁸

13.20 The aggravated dimension of the problem was very much evident when the Delhi High Court issued notice to several television companies, including the Hong Kong-based Star and Zee TV, on a public interest petition filed by Jagriti Mahila Samiti seeking a ban on the display of vulgar programmes on all foreign and

¹⁶. See Abbas v. Union of India, A.I.R. 1971 S.C. 481, 497.

¹⁷. Chandrakant Kakodkar v. State of Maharashtra, A.I.R. 1970 S.C. 1390, paragraphs 12, 13.

¹⁸. Cowen, Individual Liberty and the Law (1977), pages 178 et. seq.

Indian television networks. The court took notice of the Central Board of Film Certification's report which was filed after monitoring, for two months, the various foreign and Indian television programmes beamed in India. The report said 31 programmes of eight television companies were not fit for display on TV.¹⁹

13.21 In the United States where free speech, even indecent speech, is guaranteed by the Constitution's First Amendment, the Congress was forced to pass a bill criminalising the online transmission of words and images that may fall short of the Supreme Court tests of obscenity (lacking literary merit, violating community standards etc) and imposing fines as high as \$1,00,000 and prison sentences of up to two years on anyone who knowingly exposes minors to "indecent" online.²⁰ Pornography in cyberspace is the latest

¹⁹. The Times of India (Mumbai), 13 January 1996.

²⁰. Time (New York), 18 December 1995. Redrup (supra n. 4) was later supplemented by the holding of Stanley v. Georgia, 394 U.S. 557 (1969) - that the Constitution forbids criminalizing the possession of obscene material (however defined) in the home - to create a rule regarding obscenity: consenting adults could have whatever they wanted; nonconsenting adults and children could be protected; and knowing what obscenity is could be avoided. This combination was put on hold and questioned in 1971, when the Court refused to declare the federal obscenity laws unconstitutional and authorised a ban on commercial importation of admitted hard-core pornography. See United States v. Reidel, 402 U.S. 351

menace offered by technological advance and it is not easy to counter it. As pointed out by Julian Dibbell,²¹ it would be difficult to preserve civil liberties while curbing cyberporn and should the bill become law the Supreme Court would find it unconstitutional.

13.22 American courts have not yet ruled on whether the Internet is a print medium like a newspaper, protected from government censorship, or a broadcast medium like TV whose content is closely regulated by the Federal Communications Commission. Perhaps we may not be confronted with such a difficulty because what is guaranteed here is freedom of speech and expression and any mode of expression is subject to restrictions under Article 19(2). However, the present sweep of the Press Council may not be wide enough to encompass all modes of expressions and it would be better for the Council to limit its oversight to the print medium alone. In agreement with the changing social norms and mores, it is imperative that the concept of obscenity should also be redefined.

(1971) and United States v. 37 Photographs, 402 U.S. 363 (1971).

²¹. Ibid.

Part Three

THE PRESS COUNCIL
CASE-BOOK

CHAPTER 14

1

ADVERTISERS AND ADVERTISEMENTS

Advertising in the press

False claim about circulation is a gross breach of journalistic propriety (Hardwar Darshan, 1968).

It is unethical to publish dummy advertisements (The Hitvada, 1980 Ann. Rep. 115-124).

Not improper to use Mahatma's statement for commercial advertisement (Times of India, 1969 Ann. Rep. 37).

Denial of advertisement

Advertisements used as instrument of punishment (Samvad Kunj, 1984(2) F.C.I. Rev. 49).

Just and equitable distribution essential (Akash Marg, 1992-93 Ann. Rep. 96-100).

Withdrawal of advertisements as an attempt to influence editorial policy (Tribune, 1970 Ann. Rep. 45).

Right to advertisement

Advertisements from any party including the government cannot be claimed as a matter of right (Sankata Uvaach, 1980 Ann. Rep. 53).

Failure to conform to the advertisement policy is good ground for non-release of advertisements (Saptahik Mujahid, 1983(3) F.C.I. Rev. 44).

Because of the large part advertising revenue plays in the economy of a newspaper, there is a widely held belief that advertisers can and do exert an influence on editorial policy. Anyone familiar with the working of a newspaper will admit that individual advertisers occasionally seek to influence the policy of a newspaper or to obtain the omission or insertion of particular news items. Any attempt by an advertiser to do so is to be condemned, and if the attempt is on the part of the government, it is reprehensible. It has been observed that withdrawal or grant of advertisements has at times been used as a lever to bring the writings in conformity with the ideas of the authority vested with the discretion to grant this facility to them. From the very beginning the Press Council was diligent enough to point out that such threat or inducement would amount to an infringement of the freedom of the press. During 1992-93, the Council adjudicated upon 25 complaints alleging withdrawal or denial of due facilities. Of these nine were dismissed while in 15 cases, the Council dropped the proceedings primarily upon amends made or on assurances given by the authorities. Action was dropped in one on account of the matter being withdrawn.

The Council has categorically stated that there is no automatic right vested in any newspaper to claim government advertisements. At the same time it is the duty of the government and public sector undertakings to ensure that there is a just and equitable distribution of advertisements based on a rational and notified policy. In this context reference may be made to a decision of the Andhra Pradesh High Court¹ where the right of the government to release its advertisements to newspapers was in question. According to a government order, all government advertisements were to be released by the Director of Information subject to certain guidelines laid down therein. The High Court ruled that the order did not affect the freedom of the press. Newspapers do not have a right to demand and obtain advertisements from the government. The government has a right to choose the newspaper in which it would advertise. The court, however, did rule that while giving advertisements to various newspapers, the government must do so without exercising any discrimination in favour of or against any particular newspaper.² The guidelines issued by the government

¹. Ushodaya Publications (P) Ltd v. Government of A.P., A.I.R. 1981 A.P. 109.

². Ramanna v. International Airport Authority, A.I.R. 1979 S.C. 1628.

for selecting newspapers were held valid with some exceptions. For example, a guideline saying that no advertisement will be released to a newspaper adopting a "rabid or abusive" tone or "distorting news for a mischievous purpose" was struck down.

The judgment in the newsprint case³ also clarifies the constitutional position regarding advertisements. The petitioners argued that the imposition of customs duty had compelled them to reduce the space intended for advertisements which had adversely affected their revenue. The Government pleaded that the right to publish a commercial advertisement was not part of the freedom of speech and expression; and newspapers often contained 'piffle'. Rejecting this argument, the Supreme Court pointed out that this approach was not permissible under the Constitution. The opinions of the government about the nature of writings might not necessarily be a true assessment. Moreover, even if newspapers contained 'piffle' -which means 'foolish nonsense- that could not be a ground for imposing a duty which would hinder circulation. For this conclusion, the court drew

³. Indian Express Newspapers Ltd v. Union of India, (1985) 1 S.C.C. 641.

support from an American case⁴ wherein the U.S. Supreme Court had held that second class mailing privilege could not be denied to publications merely on the ground that in the view of the Postmaster General the matter was not in good taste.

The type and quantum of advertising a newspaper gets will depend on the character of its readership and circulation. This may tend a newspaper, which solely depends on advertising for its viability, to submit false claims about circulation. This, according to the Council, is a gross breach of propriety and ethics. At the same time, verification of circulation by means other than through the Registrar of Newspapers was deprecated.

In contrast to allegations that newspapers are subject to pressure from advertisers, allegations that newspapers sometimes refused unreasonably to accept advertisements from would-be advertisers were also investigated by the Council. A newspaper should have a right to refuse advertisements of any kind which are

⁴. Hannegan v. Esquire Inc. (1946), cited in P M Bakshi, Press Law - An Introduction (New Delhi: TRF Institute for Social Sciences Research and Education, 1986), p. 47.

contrary to its standards or may be objectionable to its readers. The right, however, ought not to be exercised arbitrarily.

The Press Council has also adjudicated upon newspaper's own advertisements and publicity and censured those considered misleading or in bad taste.

The cases dealt with follow.

ADVERTISING IN THE PRESS

False claim about circulation²

A Hardwar daily carried an imprint on its mast-head that it was the largest circulated Hindi daily of northern India. It was found out from the information furnished by the Registrar of Newspapers that it was a weekly printing only 1,025 copies with a paid circulation of 73 copies per week.

The Council said the claim was deliberately false and obviously intended to mislead the advertisers. It held this to be a gross breach of journalistic

². 1968 Ann. Rep. 23.

propriety and had no hesitation in censuring the editor.

Unethical to publish dummy advertisements⁶

The complaint against Hitvada, an English daily of Bhopal, was that it resorted to unethical practices like publishing dummy advertisements and plagiarism etc.

The Council upheld the complaint since the advertisements had neither been paid for nor authorised by the advertisers. Hence the newspaper had transgressed the norms of journalistic ethics. A warning was issued to the editor to refrain from such practices.

Using Mahatma's statement for commercial advertisement⁷

The text of an advertisement in Times of India read: "The Singer sewing machine is one of the useful things ever invented - Mahatma Gandhi." The complainant,

⁶. 1980 Ann. Rep. 115-124.

⁷. 1969 Ann. Rep. 37.

Joseph John, alleged that it commercially exploited the Mahatma's name and was consequently unethical.

The complainant had not challenged the authenticity of the Mahatma's statement. Since admittedly Mahatma Gandhi had made such a commendation, the Council held, it was not improper either for the advertiser to derive advantage from it or for the publisher to exercise his discretion to publish it.

DENIAL OF ADVERTISEMENT

As instrument of punishment^a

The Press Council took suo motu action against the government of Madhya Pradesh on the basis of a report in Indian Express that a small daily Samvad Kunj of Seoni was penalised for having exposed the involvement of some influential persons including officers and politicians in a sex scandal. The reprisal was by way of stoppage and withdrawal of government advertisements and withholding payment of bills.

^a. 1984(2) P.C.I. Rev. 49

The allegations in the Indian Express report were confirmed by Ashok Koshal, editor of Samvad Kunj. He also alleged harassment at the instance of G S Misra, Union Minister of State for Energy, and Vimla Verma, the State PWD Minister.

Though the State Government had contended that the concerned newspaper was not on the approved list for issue of advertisements, the Council found that it was getting government advertisements earlier like other newspapers. As such, it was unable to see the reason for the paper being discriminated against as regards release of advertisements. The Council asked the government to place the newspaper on the approved list for release of government advertisements.

Just and equitable distribution?

The editor of Akash Marg, a small newspaper with a circulation of 12,000, complained that the government of Bihar was not giving their due share of advertisements to small newspapers. Denying any discriminatory treatment, the government informed the inquiry committee that advertisements were released

? . 1992-93 Ann. Rep. 96-100.

keeping in mind the requirements of the advertisement policy. The complainant, however, alleged that the hostile action of the government was due to the critical articles against the then Chief Minister of Bihar, Shri Bhagwat Jha Azad, in 1988.

Reminding governmental authorities that their expenditure on advertisement was expenditure of public money, the Council stressed the need for ensuring its just and equitable distribution. The Council also found it highly improper the association of police officers with checking and certifying the circulation figures of newspapers. It felt that circulation figures certified by the Registrar of Newspapers should be accepted by the authorities.

The Council noted that advertisement cannot be claimed as a matter of right. It would not, as a matter of course, entertain complaints pertaining to denial of advertisements unless any mala fide was established such as stoppage by way of reprisal for criticising the government or officials.

Attempt to influence editorial policy¹⁰

R Madhavan Nair, editor of Tribune, in his complaint alleged, inter alia, that the Haryana government had stopped its advertisements because two editorials appeared in the newspaper had reportedly infuriated Bansi Lal, the then Chief Minister. While admitting that advertisements had been stopped, the government denied that it was due to the fact that the Chief Minister was infuriated.

Having stated the principles on which the government should distribute advertisements, the Council observed that from this it would follow that where advertisements were withheld from a newspaper for the reason mentioned in the complaint, viz., its editorials being critical of the government, it would certainly be a case of threat to press freedom and a device adopted to influence editorial policy.

In summing up, the Council emphasised three points: (i) in the matter of distributing advertisements, a government's discretion is not absolute. It is conditional on the advertisements not

¹⁰. 1970 Ann. Rep. 45

being placed or withheld for the object of influencing a particular paper's editorial policy or as a means of punishment for persisting in an editorial policy not meeting its approval; (ii) these withdrawal of advertisements, since they attempted to influence editorial policy, constituted an invasion on press freedom; and (iii) one of the main purposes for the establishment of the Press Council is safeguarding the liberty of the press and preserving it from government interference or preventing a government from influencing the editorial policy.

Finding the withdrawal of advertisements from Tribune as calculated to threaten its freedom, the Council considered it as an attempt to influence its editorial policy. Disapproval of this "invasion of the liberty of the press and freedom of the editor in conducting his newspaper" was recorded by the Council and the action of the government was condemned.

Delisting of newspapers not justified¹¹

Searchlight, an English daily of Patna, and Pradeep, its sister Hindi daily, were delisted without issuing

¹¹. 1974 Ann. Rep. 11

any show-cause notice which, according to S K Rau, the editor, had injuriously affected the freedom of the papers. Mr Rau pointed out two reasons for the Chief Minister's antipathy towards his newspaper: (i) his complaint to the Council questioning the propriety of the Chief Minister appointing a member of his staff as a member of the Food Committee with the status of a cabinet minister; and (ii) comments by the paper pointing out lapses of the administration which, according to him, was part of his public duty.

In the Council's opinion, delisting of the newspapers by the government was vitiated by taking into consideration matters "wholly alien to and irrelevant for determining the character of the matter published in the paper". Apart from this, the Council having dealt with passages in the impugned matter concluded that delisting of the twin newspapers was not justified and withdrawal of advertisements was meant as a punishment for pursuing an independent policy. To criticise the administration for its acts of omission and commission was part of the duty of the press and the government should not be so thin-skinned as to consider that any criticism of it which displeased it was ground for vindictive action. The Council expressed

the hope that the government would reverse its decision, relist the papers and would continue to release advertisements as before.

RIGHT TO ADVERTISEMENT

No automatic right to claim advertisement¹²

Sankata Uvaach, a Hindi weekly, alleged that the State Government of Uttar Pradesh had not accorded recognition to the paper for release of advertisements due to critical writings published in the paper. It was further pointed out that certain other local weeklies were being patronised for advertisements though they had no better claim.

The government maintained that certain guidelines, laid down for approving newspapers for government advertisements, had not been met by the newspaper.

The Council laid down the principle that no one has a right to claim that any paper which has been registered by him as a newspaper should have benefit of the release of government advertisements. At any rate

¹². 1980 Ann. Rep. 53

the conditions laid down by the government itself for releasing advertisements must be fulfilled. It would have been a somewhat different matter if the complainant newspaper had originally been included in the approved list and then deleted without proper justification as a consequence of writings unpalatable to the authorities or if unlawful discrimination could be established at the executive level.

Obligation to conform to advertisement policy¹³

The editor and publisher of Saptahik Mujahid of Assam alleged that denial of approval by the Chief Minister for releasing advertisements to their newspaper had been without any reason. They submitted that the newspaper had fulfilled the initial requirements for approval and the Deputy Secretary (Publicity), Home Affairs, who was the legitimate authority, had recommended approval.

The State Government asserted that the newspaper was not maintaining proper journalistic ethics and was indulging in baseless and motivated publication of writings and reports tending to fan communal passion.

¹³. 1983(3) P.C.I. Rev. 44.

It was further asserted that due to its limited circulation the government was not bothered to issue contradictions and withholding of approval for releasing advertisements was in conformity with the government's advertising policy.

The Council inclined to the view that there was no substance in the complaint. It felt that good grounds existed for non-release of advertisements so long as the newspaper failed to conform to the government's advertisement policy. The fact was emphasised that the getting of advertisement from any party including the government cannot be claimed by a newspaper as a matter of right. The complaint was dismissed in the absence of any proof regarding arbitrary or mala fide action by the government.

THE PRESS AND
THE POLICE

Handcuffing and parading of journalists (Saptahik Sputnik, 1992-93 Ann. Rep. 33; Suo-motu action taken by the Council, 1986 Ann. Rep. 30; Weekly Nashak, 1986 Ann. Rep. 36).

Police attack on newspaper offices (Gujarat Samachar, 1986 Ann. Rep. 44).

Police inaction in breaking blockade (Case of the Bangalore newspapers, 1982(1) P.C.I. Rev. 36).

Editor abducted by police (Prachand, 1983(1) P.C.I. Rev. 33).

Illegal arrest of correspondent (Blitz, 1983(2) P.C.I. Rev. 31).

Police insulting and threatening editor (Jai Ai Asom, 1982(2) P.C.I. Rev. 53).

Journalists assaulted (Indian Express, 1982(2) P.C.I. Rev. 61).

Crime is the business of the police. But crime is news, of public interest, and the public is entitled to be informed about it. As such crime is the business of the press also. In the normal gathering of the news and in the course of legitimate inquiries, reporters frequently obtain information which enables fraud, corruption and vice to be exposed in the newspapers and the police to bring those involved to justice. But in a country where the nexus between the police and criminals is a fact beyond mere surmise, police officers are also getting exposed at times through the

newspapers. A conflict thus becomes inevitable.

The Royal Commission on the Police had no doubt of the value of good relations between the press and the police. Its Report of 1962 stated that the press was an important intermediary between the police and the public and that it had a useful part to play in helping the police; the police for their part, could render a reciprocal service by taking the press into their confidence and making available information the public should be given.¹⁴

Everything will go on well as long as the press is willing to toe the police line, swallow the police story, applaud the police and report prominently the not infrequent instances of their bravery. However, free and critical writings inevitably tend to heckle those against whom such writings have been directed and the authorities are more often than not observed to have used their powers to cow down such writers. This usually manifests in the form of harassment, threat or raid. At times even physical violence is resorted to. The police is an important agency acting as an

¹⁴. H Phillip Levy, The Press Council (London: Macmillan, 1967), p. 346.

instrument in harassing newsmen.

The Council adopted a resolution at its meeting in Bangalore in December 1967 which laid down its opinion on the complaints regarding attacks on newspapers and newsmen. Cases of this nature brought before the Council later were adjudicated on the basis of this principle.

The resolution inter alia said: "It (the Council) views with concern tendencies to coerce newspapers to desist from publishing facts or toe a particular line. The Council is particularly concerned with the reported failure of certain State Governments to provide adequate protection to newspapers as well as their representatives engaged in the performance of their duty.

"The Council urges upon the people in general and political parties and the governments in particular to see that newspapers get full opportunity to gather facts and express their views fully and also ensure that newsmen function without threat of coercion,

intimidation or physical violence".¹⁵

The Council adjudicated upon a total of 33 such matters in 1992-93. Of these, charges were found to be substantiated in nine matters while 12 stood disposed of upon amends having been made or on assurances having been given by the authorities. In five other cases the Council dropped the inquiry or found no action to be warranted upon the matters having become sub-judice or being withdrawn. Seven complaints were rejected.

Handcuffing and parading of a journalist¹⁶

Avantilal Jaiswal, Indore-based correspondent of Saptahik Sputnik, complained that on 18 February 1991 the Superintendent of Police forcibly entered his house, arrested him, and paraded in the streets with handcuffs. According to him the police was wreaking vengeance upon him for his critical writings but the Government explained that the action under the Excise Act was consequent to the detection of his shady deals under the veil of journalism. The complainant

¹⁵. N K Trikha, The Press Council (Bombay: Somaiya, 1986), pp 125-26.

¹⁶. 1992-93 Ann. Rep. 33.

reiterated that the authorities were provoked by the publication of a report: "Price of a tribal girl only Rs 500".

The Inquiry Committee of the Council was of the opinion that the handcuffing of the journalist was actuated by malice because of his reports criticising the police. It was also established that the complainant was not only handcuffed but was paraded on the road and six criminal cases were registered against him though none of them was sent to court. Pointing out the repeated direction of the Supreme Court that the police should not handcuff a person accused of an offence unless they have reasonable grounds to believe that he will abscond or avoid his arrest, the Committee said this dictum was honoured in breach. Upholding the complaint, the Council reminded the authorities that in case they found anything objectionable or violative of the ethics of journalism in the writings of a journalist, the proper course for them is to approach the Council.

On earlier occasions also¹⁷ the Council had condemned the practice of handcuffing journalists as

¹⁷. 1986 Ann. Rep. 30, 36.

glaring instances of humiliation, insult and harassment with the object of teaching the journalists a lesson for exposing the misdeeds of the authorities. It tantamounts to jeopardising the freedom of the press. Noting with deep concern the past conduct of the State Government (of Orissa) in the matter of dealing with journalists, the Council directed the Government to issue strict guidelines to the police on the use of handcuffs in the light of the Supreme Court judgment. It is a sorry commentary on the state of affairs that after six years the Council had to repeat the same resentment.

Attack on newspaper offices^{1e}

In 1985 the Press Council initiated suo motu inquiry on the basis of a news in Indian Express: "Ahmedabad handed over to army as police revolt - Cops attack newspaper offices, reporters". According to the report, policemen directed their wrath at the press for highlighting police atrocities in the city during the previous days. Following the killing of an head-constable by the mob, the office of Gujarat Samachar was set on fire by irate policemen. The office and

^{1e}. 1986 Ann. Rep. 44.

press of Western Times was gutted. Both the newspapers were unable to publish their editions for an indefinite period while Times of India and Indian Express suspended their editions for a day in protest against the police attacking their staff.

The Inquiry Committee felt that the attack on Gujarat Samachar, whether done by the police or others, constituted grave danger to the freedom of the press and a serious interference with its independence. Condemning the State Government for its failure to maintain freedom of the press, the Committee said that such a situation could and did arise would shock the conscience of everybody who cherishes freedom of the press. At the same time the Committee had a word of caution to the press also. The press was advised that in respect of any writing or publication in relation to sensitive matters, proper restraint should be exercised.

Police inaction in breaking blockade¹⁹

The Council took suo motu action on reports that four Bangalore dailies - Deccan Herald, Prajavani, Indian Express and Kannada Prabha - failed to appear in the

¹⁹. 1982(1) P.C.I. Rev. 36.

morning of 23 September 1980 as a result of a night-long blockade by members of the ruling party, the Congress-I. The Council asked the Chief Secretary, Government of Karnataka, to furnish details of the siege laid on the two newspaper establishments which publish the four dailies by the storm-troopers of the party. Although the State Government had questioned the Council's jurisdiction at the outset, that resistance was abandoned when Justice Grover, the Council Chairman, wrote to Mr Gundu Rao, the Chief Minister. Asserting that it was a "single and stray incident which was purely a law and order situation," the Chief Minister maintained that initiation of suo motu action might not be warranted. The newspapers maintained that the blockade had been pre-planned at the instance of the Chief Minister, and the Police Commissioner had prior knowledge of it.

The final argument before the Inquiry Committee revolved around two main issues: (i) whether the so-called blockade by members of the Congress-I had been at the instance of the Chief Minister; and (ii) whether there had been such inaction by the police as might give rise to comments and observations.

After carefully considering the main points involved in the adjudication, the Council concluded that it had been established that the blockade did take place and was of the view that such blockade interfered with the freedom of the press. Such acts were condemned. It was also concluded that there was no direct evidence to prove that the blockade or seige of newspaper offices had been effected at the instance or with the prior knowledge of the Chief Minister. The circumstantial evidence failed to conclusively establish that the Chief Minister had a hand in the incident. In this connection the well-settled rule of law was emphasised that "circumstances from which an inference of guilt is sought to be drawn must be incompatible with the innocence of the person against whom that evidence is used and must be incapable of explanation upon any other reasonable hypothesis than that of his guilt". Even if the Chief Minister, feeling aggrieved by the newspapers concerned, had shown his displeasure in his speeches, it did not follow that he was responsible for bringing about the blockade.

However, there could be no doubt about the police inaction to disperse the demonstrators; while this could be attributed to an anxiety to avoid any

unpleasant development, it was emphasised that "the police could have without any serious apprehension of breach of peace, put the so-called 'young persons and students into vans" and taken them away, thereby bringing an end to the blockade. In regard to the manner in which the investigation was conducted, the Council felt that there were vital contradictions and lapses. The evidence also suggested that Mr H D Sangliana, the Deputy Commissioner of Police, could not function effectively. The Council felt that it was for the State Government to make an inquiry into certain features that appeared to be somewhat unusual, since it was not within its charter to go into the regularity and validity of the investigation.

Police abducting editor²⁰

The complainant, Asha Bhandari, alleged that her husband, V M Bhandari, editor and publisher of Prachand, a Hindi weekly from Bombay, had been abducted by the Haryana police. This, according to her, was consequent to certain writings in the weekly whereby the corrupt deeds of the then Haryana Chief Minister, Bhajan Lal, and his colleagues had been exposed. It was

²⁰. 1983(1) P.C.I. Rev. 33.

stated that the editor, implicated in a fabricated case under the Official Secrets Act, had been handcuffed, shackled, beaten up and kept in an isolated place.

The State Government, while admitting the arrest, denied the charge of handcuffing and abduction. The Press Council noted the fact that no effort was made by the State Government to rebut Bhandari's allegations of maltreatment by the police resulting in his hospitalisation. The Council upheld the complaint of harassment and maltreatment on account of the critical writings by Bhandari.

Illegal arrest of correspondent²¹

In his complaint against Patna police, a former correspondent of Blitz alleged his illegal arrest in a false case. This, according to the complainant, was due to his refusal to divulge his source of information regarding the whereabouts of a college girl who, having run away from her parents, had married a Patna University student. He submitted that on account of his critical writings he was harassed by the police. In April 1981 he wrote a story against the marathosex

²¹. 1983(2) P.C.I. Rev. 31.

scandal in Patna Medical College and also about the Bihar Shariff riots. On 10 June 1981 he was arrested for abduction of a girl. On account of the arrest, his services were terminated by the newspaper.

Having heard the complainant and examined the material on record, including the letter of the Inspector General addressed to the editor exonerating the complainant from involvement in the episode, the Council took the view that the State Government should have conducted a proper inquiry into the matter against the officers responsible. It concluded with the observation that the Government could still consider the expediency of doing so.

Insulting and threatening the editor²²

K C Sharma, editor of Jai Jai Asom, a fortnightly from Tezpur, alleged in his complaint dated 11 March 1980 that B N Phookan, Superintendent of Police, Darrang, had insulted him and threatened to arrest him on flimsy charges like publishing false news in his paper. This, he stated, was provoked by a news item appearing in Dainik Janmabhumi (of which he was the Tezpur

²². 1982(2) P.C.I. Rev. 53.

correspondent) relating to contempt of court proceedings against Phookan. In subsequent communications he submitted that the Government of Assam had started harassing him by illegal requisitioning of Jai Jai Asom office premises to accommodate the police force.

Denying the allegations, the Government clarified that the Superintendent of Police was only verifying the registration of the newspaper under the Press and Registration of Books Act. The officer also felt it necessary to verify whether Sharma had made disparaging remarks against Sanjay Gandhi on the basis of an intimation from a respectable quarter.

The Council observed that it was one of those rare cases where a high official holding the office of Superintendent of Police had himself made an enquiry for breach of section 3 of the Press and Registration of Books Act. It was contended that he did so under any direction from an appropriate authority under the Act. The Council was of the view that even assuming that he conscientiously felt that he was under a statutory obligation to enforce the provision of the Act, the further incident relating to an alleged statement made

by the complainant was not in any way connected with the enquiry he was making under the Act. It observed that there were many ways of humiliating a person and the complainant, having incurred the displeasure of the Superintendent of Police, was summoned to appear under the Press and Registration of Books Act and then confronted with the alleged statement involving derogatory remarks. The Council, therefore, upheld the complaint to the extent that there was some sort of maltreatment or humiliation to which the editor had been subjected.

Journalists assaulted²³

A group of newsmen met a Press Council team and protested against the treatment given to journalists at a function in Hussainiwala to commemorate the martyrdom of Bhagat Singh. A formal complaint filed by them alleged that Swadesh Talwar, news photographer of Indian Express, Chandigarh, had been mercilessly beaten up by the police. This was supported by documentary evidence and clippings from various newspapers which reported the incident. Further, it was stated that Jagtar Singh who was accompanied by Sunil Baghi was

²³. 1982(2) P.C.I. Rev. 61.

also beaten up when they went to rescue Talwar. His camera was also snatched by the police.

It was explained that when unruly elements tried to disturb the function in which the Chief Minister, Darbara Singh, was addressing a huge gathering, the police had to resort to a mild cane-charge. Only subsequently the police came to know that some pressmen/cameramen got mixed up with the miscreants. Since they had no press badges, the police were unable to distinguish them from the general public. The allegation of snatching away of the camera was denied.

The Council was of the considered view that while Talwar and Jagtar Singh, photographer and reporter respectively of Indian Express, were injured, the evidence was conflicting as to whether they were beaten up after disclosure of identity. The Council noted that none of the injured pressmen had gone to the local first aid post which corroborated the medical reports of injuries being of a minor nature. Also had they been picked out of the crowd as special victims of the wrath of the Deputy Superintendent of Police, the injuries would have been more severe. As regards the charge of snatching away the camera, the Council felt that it

would be reasonable and legitimate to hold that the police had indeed snatched it at the time of the incident though it might be difficult to name the person who did so. However, it emphasised that a "considerably serious view must be taken of the snatching away of the camera and the removal of the film etc.," before being delivered back to the photographer. The Council decided to uphold the complaint to the extent mentioned above.

INTERFERENCE
FROM WITHIN

Non-publication at the instance of workers (Jugantar, 1981 Ann. Rep. 73).

Curb on editorial freedom by management (Aljamat, 1984 Ann. Rep. 37).

Interference in editorial affairs by management (Mathrubhumi, 1989-90 Ann. Rep. 72).

Editor's resignation under pressure (Indian Post, 1989-90 Ann. Rep. 81).

A very exciting case of far-reaching importance arose in 1974 on the basis of two complaints filed by journalists in defence of B G Verghese, editor of Hindustan Times, who was sought to be removed from that post by the proprietors. Though the case remained inconclusive when the Press Council was abolished in 1976, a number of issues involved in and arising out of the case were settled by the Delhi High Court.²⁴

The complainants, D R Mankekar and C P Ramachandran, had submitted before the Press Council that freedom of the press was synonymous with the freedom of the editor to pursue an editorial policy

²⁴. K K Birla v. Press Council of India, I.L.R. 1976(1) Delhi 753.

free from external pressure; that B G Verghese was following an independent editorial policy exposing the defects and misdeeds of the establishment; that K K Birla, chairman of the Hindustan Times Limited, was under pressure from the Government to replace the editor; and that there was a threat to terminate services of Verghese. It was also pointed out in the complaint that Birla had sent a notice to Verghese in August 1974 asking the latter to cease to be the editor with effect from 28 February 1975 without disclosing any reason.

Birla took a preliminary objection regarding the jurisdiction and maintainability of the two complaints under the Press Council Act. He raised a very interesting and important question with wide implications: the Press Council was intended to help newspapers if only there was an encroachment on them from the government or public authorities, hurting the press. Since no such thing had happened, the controversy stated in the complaints fell under the Industrial Disputes Act and thus the Press Council had no power to adjudicate under proviso 2, clause 12(a)(i)

of the Press Council Act 1965.²⁵ Another objection was to the effect that the Council as a body was an interested party in the controversy and, therefore, editors and journalists who were members of the Council were not entitled either to vote or participate in the discussion. Both objections were overruled and the Council began its inquiry with the examination of Verghese.

The validity of the proceedings were challenged by Birla in the Delhi High Court where it was contended that protection to the freedom of the press was available against the State and not against an individual or a joint stock company. It was also contended that the editor had no fundamental right under Article 19(1)(a) of the Constitution as against the proprietor of a newspaper.

The counsel for the Council raised a preliminary issue regarding the jurisdiction of the High Court in relation to a proceeding that has been brought before the Council. The Council does not issue any enforceable

²⁵. Section 12 was amended in 1970 adding the proviso "that nothing in this clause shall be deemed to confer on the Council any functions in regard to disputes to which the Industrial Disputes Act, 1947, applies."

order or direction. It merely expresses its opinion on matters brought to its notice and it has no legal sanction. The counsel argued that such an opinion was not amenable to the writ jurisdiction of the High Court. However, the court declared that looking at the composition of the Council and the nature and functions entrusted to it, the decision given by the Press Council about the propriety of Birla's action terminating the service of his editor would have considerable influence on the readers. It will have serious repercussions on the circulation of his newspapers, affecting his proprietary rights. A person who will be prejudicially affected by the opinion of the Council has sufficient legal interest to invoke jurisdiction of the court under Article 226 of the Constitution.

At the same time the High Court held that normally under the Press Council Act it was for the Council to decide whether this jurisdiction was there or not. "Where a statute creates a certain body and entrusts jurisdiction on the basis of a certain jurisdictional fact to such a body, the existence or non-existence of that fact is to be determined by that body. The Press Council has assumed jurisdiction by rejecting the

preliminary objections... Questions of inherent jurisdiction are always to be decided before the merits are considered and that is what is done by the Press Council."

On the main question relating to the independence of the editor, the High Court referred to a volume of material including the opinion of the Press Commission (1954). The High Court quoted approvingly from the report²⁴ which stated, inter alia, that the need for maintaining editorial independence, objectivity of news presentation and fairness of comment were the aspects which should be looked after by the Press Council which would also have responsibility of fostering the development of the press and protecting it from external pressure.

Enquiring into the reasons for the enactment of the Council, the High Court found that the reason was to safeguard the liberty of the press and then went on to define it. The court observed "freedom is always from things and certain circumstances. It is the state of being at liberty rather than constraint or under

²⁴. First Press Commission Report, Vol. 1, p.947 (1954).

restraint. Freedom is an exemption from external control, interference or regulation. Freedom of the press then is the right to publication through the medium of printed material without any restriction or compulsion from any source whatsoever and subject only to the valid laws made under Article 19(2) of the Constitution. It is the right to publish and circulate the ideas, opinions, views and comments with complete freedom. A free press is free from compulsion from whatsoever source, governmental or social, external or internal. The liberty of the press is indeed essential to the nature of a free democratic state. It consists in laying no previous restraint upon publication by any agency."

Describing the editor as the living articulate voice of the press who speaks through the paper, the court held that he has the right to gather the news, right to select the news for inclusion in the newspaper, the right to print the news so selected, and then the right to comment and express his own views on all matters of public importance. All these rights were in existence and had arisen from the common law before they were declared and guaranteed by the Constitution. "The value of the newspaper is in its contents, the

selection of which is the sole and undivided responsibility of the editor".

At the same time the court accepted the proprietor's right to lay down the editorial policy or the guidelines which the editor has to follow or to have his own viewpoint expressed through the newspaper. The Press Commission²⁷ had also said that

We do not deny to the owner and proprietor his basic right to have his point of view expressed through the paper... When a proprietor changes the editor he should also delegate to him a measure of individual authority which would enable him to carry out his policy and to resist any attempt to divert the policy in anti-social directions.

The court held that "any interference with the presentation of the news, views or comments or any attempt to suppress or constrain it would be impairment of that freedom. The selection of the news is the sole responsibility of the editor... the proprietors or owners of a newspaper are entitled, if they so wish, to lay down any partisan policy for the newspaper and make the newspaper an instrument of propagation of their

²⁷. Ibid, p.1413.

policy... but once having laid down the policy the editor has to be left to work independently within the framework of that policy."

The court ruled that independence of the editor is included in the independence of the newspaper. The owner or proprietor is at liberty to exercise his undoubted right to hire and fire or to terminate the employment or sever his relationship by any cause which seems to him proper but not as a punishment or for discouragement of the editor's responsibilities and functions which relate to freedom of press or independence of the newspaper. When this is done the jurisdiction of the Council is attracted under section 12 of the Act²⁰ to preserve the editor's freedom and to maintain his independence. It will be for the Council to determine as to what is the foundation of the termination. The Council has jurisdiction to find out the motive behind the termination of an editor's services and ascertain whether any improper or undue influence was being brought to bear on the editor in the discharge of his duties as an editor. The Council has jurisdiction to decide on the facts of the given case whether there has been pressure on the editor

²⁰. Section 13 in the new Act.

subversive of the freedom of the press or violative of the independence of the newspaper.

The High Court made another important observation in regard to the industrial dispute between the editor and the proprietor. It said the Press Council had no jurisdiction to settle the terms and conditions of service of the editors or to order the reinstatement or to pass any enforceable orders for the grant of salary, wages, gratuity or other benefits accruing on the termination of services. The Council is not competent to force an editor on the proprietor. At the same time where the action of termination or dismissal may be legally correct and yet constitute a threat to the freedom of the press, the Council may pronounce its opinion on the propriety of the termination or dismissal.

Resignation under pressure²⁹

The Press Council deplored the episode of Vinod Mehta having had to resign from the editorship of Indian Post under pressure from the proprietor.

²⁹. 1989-90 Ann. Rev. 81.

Interference in editorial affairs³⁹

On a complaint by P. Rajan, Assistant Editor, against Mathrubhumi, alleging intimidation and interference in the editorial affairs by the management, the Council issued certain guidelines touching on the relationship between the management and the editor. It was held that in all matters relating to the administration of the editorial department, including appointment, promotion, transfer and deputation of working journalists, it would be obligatory for the management to act on the recommendations of or in consultation with the editor. The responsibility for maintenance of discipline in the editorial department, including the power of granting leave to working journalists, shall be delegated to the editor and only cases of termination of service or removal or dismissal from service of the employees in the editorial department not below the rank of Assistant Editor should be dealt with by the management and there too action shall be taken in accordance with the recommendation of the editor.

³⁹. 1989-90 Ann. Rev. 72.

Interference on the part of workers³¹

Interference can be from within as well. In 1979, a chief subeditor and some other journalists of a mass circulated Calcutta daily, Jugantar, complained that a group of employees belonging to a trade union had interfered with the working of the journalistic wing of the paper. Their case was that a group of print workers had misbehaved with the night editor and changed the front page layout by substituting some stale news in the space meant for a picture that was not yet ready on account of power cut. Further, it was submitted that the workers believed that the proposed insertion of words "the block was not received because of the power cut" in the space earmarked for the said block was an attempt to malign the Left Front Government. The news editor had reportedly lodged a complaint with the editor about the incident but no action was taken. The complainants contended that such action by a group of employees to please the ruling party was a direct interference with the functions of journalists.

In the course of the inquiry the president of the concerned union contended that the subject matter of

³¹. 1981 Ann. Rep. 73.

the complaint was not within the Press Council's jurisdiction but was a matter strictly between employer and employees having no bearing on the freedom of the press. The Council rejected this view holding that the matter did fall within the charter of the Council.³²

In its adjudication the Council concluded that the management should have intervened effectively and brought about a settlement between the concerned workers and the journalists. The Council reprimanded the interference with freedom of the press from within and upheld the complaint.

In considering the complaint, the Council approvingly referred to the British Press Council rulings³³ on the subject. It noted that a strict view was taken with regard to non-publication or interruption or any changes made at the instance of newspaper workers. In the case of Evening Standard³⁴ it had emphasised the importance to the public of freedom of the press and the newspaper's right to

³². Under section 13(2)(h) of the Press Council Act, 1978.

³³. 18th Annual Report (1971).

³⁴. Ibid, at 67.

publish what it lawfully may. In the case of Evening Post³⁵ it said: "To stop publication or threaten to do so in order to suppress news or comments, however unpalatable to some the item concerned may be, is censorship." To resist such attempts, it was pointed out, was one of the functions of the Press Council. It was stated that it is entirely unacceptable in a free society that protests should be allowed to take the form of a direct attack upon the freedom of the press and denial of the right of a newspaper to publish what it lawfully may. The destruction of press freedom would be disastrous to the public as a whole and to both sides of the industry.

Curb on editorial freedom by management

In the Aljamiat³⁶ case, the Press Council held it highly unethical and illegal to publish news items condemning the editor and announcing his suspension from the editorship while his name continued to be printed as editor in the printline. It goes without saying that by virtue of section 1(1) of the Press and Registration of Books Act 1867 and in accordance with

³⁵. Id., at 68.

³⁶. 1984 Ann. Rep. 37.

related conventions, it is the editor who controls the selection of material for publication in a newspaper. In the instant case, the impugned items were inserted in the newspaper at the instance of the management and without the knowledge of the editor.

Naaz Ansari, editor of the Urdu daily Aljamiat, was condemned and subsequently suspended for publishing a UNI despatch from Baghdad about the deliberations of the Islamic Popular Conference. The Indian delegation to the conference was led by Maulana Asad Madani who was the president of the Jamiat Ulema-i-Hind of which Aljamiat was the official organ. The UNI report was carried on the front page of the paper with broad headlines giving prominence to the views attributed to Maulana Madani. But, the management took exception to the publication of this story, alleging that it was absolutely incorrect and intended to defame the jamiat Ulema-i-Hind.

The Press Council took note in this connection a controversy between the owner and editor of the Observer (London). The independent directors of the company had held the owner, Rowland Tiny Rowland, guilty of "improper proprietorial interference" in the

editorial freedom of the editor. They censured Rowland for publishing criticism of his editor over an article alleging atrocities in the Metabeleland province of Zimbabwe which according to them constituted "inhibition, if not restraint, on the editor's freedom".

The Council observed that the attitude of the management of Aljamiat was worse considering the fact that its editor was condemned in his own newspaper while he legally remained in control of and responsible for selection of all material in the newspaper. The Council held the management guilty of unethical acts and of causing serious injuries to the editorial freedom.

ACCREDITATION
AND FREEDOM

Accreditation Committee shall be constituted in conformity with the recommendations of the Second Press Commission (Delhi Administration and Government of Bihar, 1983(2) P.C.I. Rev. 25).

Declaration cannot be cancelled (Government of Madhya Pradesh, 1983(3) P.C.I. Rev. 43).

Denial of accreditation facilities (Indian Federation of Working Journalists and others, 1980 Ann. Rep. 63).

Withdrawal of subsidy (Chandigarh Union of Journalists, 1974 Ann. Rep. 68).

Speedy authentication of declaration (Searchlight, 1971 Ann. Rep. 75).

N K Trikha, Special Correspondent of Nav Bharat Times and member of the Press Council, sent a complaint to the Council against the Delhi Administration and the Government of Bihar alleging (i) that the Delhi Administration had constituted the Accreditation Committee in a manner detrimental to the interests of many newspaper associations/agencies; and (ii) that as regards grant of accreditation facilities to newspapermen, the Government of Bihar had been exercising its authority injudiciously. The complainant desired the rules relating to accreditation be looked into so as to examine the existence of any element likely to affect freedom of the press.

At the hearing before the Inquiry Committee, an assurance was given on behalf of the Delhi Administration that the accreditation rules would be reviewed while constituting the Accreditation Committee. The Government of Bihar also agreed to an amendment of its accreditation rules.

The Council directed the Government of Bihar to reconstitute the Accreditation Committee in conformity with the recommendations of the Second Press Commission and adopt the central accreditation rules. Further, taking an overall perspective of the workings of accreditation committees in various States, the Council decided to ask the State Governments to reconstitute the committees wherever these had not been done in conformity with the recommendations of the Second Press Commission.

Declaration cannot be cancelled³⁷

Suo motu action was taken by the Press Council on the basis of a news item in Sunday Standard. It contained allegations of a grave nature, falling within the Council's jurisdiction, as "it was a development likely

³⁷. 1983(3) P.C.I. Rev. 43.

to restrict the supply and dissemination of news of public interest and importance, thereby affecting the freedom of the press."

The report related to the attempts of the district officials to muzzle three newspapers in Chhatarpur. The State Government informed the Council that on the basis of an enquiry report, it had conveyed its displeasure to the officials concerned and this had been published in the State Gazette. Directions had also been issued to the officials concerned as to the manner of their dealing with the press.

Since the counsel representing the three newspapers was satisfied with the action taken by the State Government, the Council decided to treat the matter as closed. However, it expressed the view that "the declaration of newspapers under the Press and Registration of Books Act 1867 ³⁰, could not be cancelled on the ground that the newspapers concerned were indulging in yellow journalism". Complaints on

³⁰. Under section 5(2) of the Act, the printer and the publisher of every newspaper shall appear in person before a District, Presidency or Sub Divisional magistrate within whose local jurisdiction such newspaper shall be printed or published and shall make and subscribe a declaration.

this ground were to be lodged with the Council. This was directed to be conveyed to the Government of Madhya Pradesh and the Central Government so that the District Magistrates and the State Governments could be so instructed.

Denial of accreditation facilities³⁹

In 1979 the Press Council received a complaint from a group of journalists against the disaccreditation of about sixty editors and distinguished journalists by the Central Press Accreditation Committee (CPAC). This was following a review of rules 5 and 6 (introduced in February 1978) by the CPAC on its own initiative. The new rules read:

5. Editors of news media may in exceptional case be granted accreditation if the CPAC is satisfied that the applicant is genuinely engaged in covering current affairs and needs accreditation for this purpose. Such applications will only be considered by the CPAC. No temporary accreditation will be granted by the PIO in such cases.
6. The Central Press Accreditation Committee may grant accreditation, as an exceptional measure, to journalists of long and distinguished service of at least 25 years who may be contributing special articles

³⁹. 1980 Ann. Rep. 63.

to a number of newspapers regularly but not attached to any newspaper which qualifies for accreditation.

The main grievance in the complaint was that the CPAC had no valid reason to arrive at the decision especially when the bulk of its members had nothing to do with accreditation as such. As a consequence of the change in the rules, some eminent editors would lose their accreditation.

The crucial question faced by the Council was whether denial of accreditation in terms of the erstwhile rule 5 would stand in the way of a proper discharge of duties and functions of the editors. In this connection it considered the role of an editor in two set-ups. As regards editors of newspapers having a fair amount of circulation, it agreed with the CPAC that they did not need accreditation. However, as regards editors who were also proprietors, the Council felt that there was some substance in the complainant's contentions. The Council observed that in such cases the papers were managed and run "with much more limited resources than bigger newspaper establishments". On several occasions they might need to take full advantage of accreditation. Also, it was noted that no substantial reason had been given as to why a decision

had been taken so soon to change the rules in September 1979 (rule 5 being introduced in February 1978). The Council did not agree with the contention that allowing accreditation to editors would open the floodgate as editors in large numbers would seek accreditation. It pointed out that even if this were so, the CPAC would have still the discretion in terms of rule 5 to extend the facility of accreditation in only the most deserving and exceptional cases.

The Council then considered the question of the category covered by the erstwhile rule 6. It felt that journalists of long and distinguished service had a valid argument in favour of their accreditation in terms of that rule. In its view the veterans' contribution as columnists or by way of special articles could be of "immense value to journalistic activity". Although a change in the rule still entitled them to most of the facilities, regular accreditation, in the Council's opinion, possibly carried a certain prestige and being denied a particular status would not make distinguished journalists feel happy. Since the number in this category was not particularly large, the number even in future could be kept at a reasonable figure since the discretion rested with the CPAC. It

observed that if the anxiety was their eligibility for housing facility on the basis of accreditation, by convention or otherwise, they must give way to younger and more needy persons and should not claim this facility.

Finally, the Council considered the question as to whether denial of accreditation facilities to editors and journalists in terms of the erstwhile rules 5 and 6 would affect the freedom of the press. The Council suggested that deprivation of accreditation facilities or distinguishing between them and other members of the profession would interfere with their contribution to free expression of views and comments on matters of great public interest. The Council was strongly of the opinion that the CPAC should reconsider the question raised before it in the light of the observations it had made.

Disaccreditation and withdrawal of subsidy⁴⁰

The gravamen of the charge in the complaint by the secretary of the Chandigarh Union of Journalists was the Chief Minister of Haryana's attempt to "influence

⁴⁰. 1974 Ann. Rep. 78

the professional judgment of journalists by means of pressure tactics and intimidation". The complainant maintained that the accreditation of two Haryana correspondents had been cancelled and housing facilities withdrawn from two others "for reporting unpalatable facts about Haryana politics". Further, he charged the Chief Minister with rude and discriminatory behaviour when certain journalists had gone to meet him to gauge his reaction on certain topical issues.

The Government of Haryana refuted the allegations and asserted that disaccreditation and withdrawal of housing facilities were for reasons other than those set out in the complaint. As regards the incident of the meeting with the Chief Minister it was submitted that he had not been rude but had politely told the journalists that others were there by prior appointment; for them he had no news to give; and they (the intruding journalists) were requested to go out.

As regards the allegation of disaccreditation, the Council was of the opinion that in the case of one correspondent, it was because of his editorial published on 12 September 1972 in view of the closeness of dates between the article's appearance and his

disaccreditation. About the second charge of withdrawal of housing subsidies to two correspondents, the Council was of the view that it was unjustified and intended as a punishment for articles/news items written by them. In the case of one of the correspondents, however, it had been restored. The Council concluded that the withdrawal of housing subsidy was an attempt to pressurise a newspaper correspondent and, therefore, the press. The third charge of insult by the Chief Minister at the meeting with the two concerned correspondents, however, the Council held, had not been made out.

Speedy authentication of declaration⁴¹

In a complaint by the editor of Searchlight, an English daily from Patna, the difficulties encountered by newspapers in getting registration under the Press and Registration of Books Act 1867 were highlighted. On considering the complaint, the Council requested the Chairman to address the government suggesting ways of eliminating delay. Three suggestions were made, namely:

- (i) Ensuring the supply of a sufficient number

⁴¹. 1971 Ann. Rep. 75.

of declaration forms and their easy availability to those desirous of using them for filing before the District Magistrate.

(ii) Prescribing a time limit not exceeding a week or ten days for seeking instruction from the Registrar of Newspapers for authentication of a declaration by a District Magistrate.

(iii) Expeditiously disposing of applications seeking instruction for authentication of declarations. A time limit of a fortnight ought to be fixed for the Registrar to communicate his instructions to the magistrate and a further week for the magistrate to transmit his orders under rule 4 of the Central Registration Rules to the applicant. Provision should also be there that if within, say eight weeks of filing a declaration before a magistrate, no communication is received from him, the applicant can proceed to publish his newspaper as if it had been registered and authenticated.

COMMUNAL WRITINGS

Recognising the great and vital role played by newspapers in educating and moulding public opinion in correct lines in regard to the need for friendly and harmonious relations between various communities and religious groups, the Press Council considers that this object would be defeated, communal peace and harmony disturbed and national unity disrupted if the press does not strictly adhere to proper norms and standards in reporting or commenting on matters which bear on communal relations. In the guidelines on communal writings issued in November 1968, the Council considers the following as offending against journalistic proprieties and ethics.⁴²

1. Distortion or exaggeration of facts or incidents in relation to communal matters or giving currency to unverified rumours, suspicions or inferences as if they were facts and base their comments on them.

⁴². See Annual Report of the Press Council of India 1969, p. 99.

2. Employment of intemperate or unrestrained language in the presentation of news or views, even as a piece of literary flourish or for the purpose of rhetoric or emphasis.
3. Encouraging or condoning violence even in the face of provocation as a means of obtaining redress of grievances whether the same be genuine or not.
4. While it is the legitimate function of the press to draw attention to the genuine and legitimate grievances of any community with a view to having the same redressed by all peaceful, legal and legitimate means, it is improper and a breach of journalistic ethics to invent grievances or to exaggerate real grievances, as these tend to promote communal ill feeling and accentuate discord.
5. Scurrilous and untrue attack on communities, or individuals, particularly when this is accompanied by charges attributing misconduct to them due to their being members of a particular community or caste.

6. Falsely giving a communal colour to incidents which might occur in which members of different communities happen to be involved.
7. Emphasising matters that are apt to produce communal hatred or illwill or fostering feelings of distrust between communities.
8. Publishing alarming news which are in substance untrue or make provocative comments on such news or even otherwise calculated to embitter relations between different communities or regional or linguistic groups.
9. Exaggerating actual happenings to achieve sensationalism and publication of news which adversely affect communal harmony with banner headlines or in distinctive types.
10. Making disrespectful, derogatory or insulting remarks in reference to the different religions or faiths or their founders.

Newspaper censured for scurrilous writing (Dainik Jagran, 1992-93 Ann. Rep. 246-249).

Embittering feelings between communities condemned

(Nama Nigar, 1969 Ann. Rep. 58-60).

Conduct of editor disapproved (Vikrama, 1969 Ann. Rep. 53-56).

Editor censured for communal bias (Chardi Kala Marg, 1983(4) P.C.I. Rev. 42-45).

Gross violation of journalistic ethics and good taste⁴³

The Press Council received a complaint from an editor about a letter published in the 'Janvani' column in the 1 June 1991 issue of Dainik Jagran, a Gorakhpur daily, under the caption: "Makri Hamre Janam Ki Mata". The impugned letter to the editor starts with the narration of a story that when Muslims started treading the wrong path led by Hassan-Hussain, the Hindus attacked them and forced them to retreat. Hassan-Hussain, in order to escape, hid in a well over which a web was woven by a spider. However, a chameleon dived into the well and broke the web. Hassan-Hussain were located by the Hindus and were killed. In the light of this, the letter says, that the Muslims are being driven to their end by V P Singh and Imam Bukhari. The complainant, Naib Hyder Rizvi, editor of Dost Ki Baat, submitted that the letter has communal overtones, attempts to denigrate and defame Hassan-Hussain through this concocted tale and is definitely provocative.

The story, spun around two great figures of Islamic history, was patently false. The writer was holding out a threat and warning to the Muslims that

⁴³. 1992-93 Ann. Rep. 246-49.

V P Singh and Imam Bukhari were driving them to their doom. The caption as well as the body of the impugned story derides not only the revered martyrs but also, by implication, the Muslim community in general by calling them the 'offspring of spider'. The Muslims were described as disloyal to the country and this innuendo spites the basic principle of ethics underlying section 153-B of the Indian Penal Code. In deference to this principle, no newspaper should publish any imputation charging a whole class of persons, inter alia, for reasons of being members of any religion, group or community, with disloyalty to the country and the Constitution.

The Press Council has, through a series of adjudications and guidelines, repeatedly emphasised that newspapers should not publish anything which is likely to promote and inflame passions, aggravate tension or accentuate strained relations between communities or groups belonging to different religions or castes or which has a potential to foment or exacerbate communal or caste discord. The impugned story constitutes a flagrant violation of this salutary norm of journalistic ethics and good taste.

Both in law and in journalistic practice, the editor is prima facie responsible for all that is published in the newspaper.⁴⁴ Section 7 of the Press and Registration of Books Act raises a presumption that a person whose name is printed as editor in a newspaper is the editor of every portion of that issue. This presumption may be rebutted. This legal position as to the editor's responsibility has been explained by the Supreme Court thus:

In order to avoid multiplicity of suits and uncertainties of liabilities, it was considered necessary to choose one of the persons from the staff and make him liable for all the articles or matter published in the paper so that any person aggrieved may sue only the persons so named under the provisions of the Press and Registration of Books Act and is relieved from the necessity of making a fishing or roving enquiry about persons who may have been individually responsible for the offending matters published in the paper.⁴⁵

⁴⁴. Section 1 of the Press and Registration of Books Act 1867 defines 'editor' as a "person who controls the selection of the matter that is published in a newspaper". This definition has been incorporated, by reference, in section 2(2) of the Press Council Act 1978.

⁴⁵. Mohammed Koya v. Muthukoya, A.I.R. 1979 S.C. 154.

In the instant case the editor did not participate in the enquiry proceedings. In the absence of any attempt to rebut the statutory presumption, it can be safely presumed that the impugned story was published with the full knowledge and consent of the editor. This inference is further reinforced by the failure of the editor to publish the complainant's rejoinder/contradiction. Here also the editor manifestly committed an offence against the norm of journalistic ethics which gives a person aggrieved by the impugned publication a right to have his rejoinder/reply or clarification published with due promptitude in the columns of the same newspaper. The respondent's failure to comply with this norm had further aggravated the wrong. Accepting the recommendations of the Inquiry Committee, the Council censured the respondent for committing gross violation of journalistic ethics and good taste.

Embittering feelings between communities⁴⁶

Two articles published in Nama Nigar, an Urdu daily of Bombay, formed the subject matter of a complaint by the Government of Maharashtra against the editor on the

⁴⁶. 1969 Ann. Rep. 58-60.

basis that they exaggerated the grievances of the Muslims and were likely to inflame communal ill-feelings. The first one was a tirade against M C Chagla for his views in favour of a uniform civil code. In particular the attack was in relation to the suggestion that the law banning polygamy should apply to Muslims as well. The second one with the heading "Is India really a democratic country?" contained observations like "minority community in India is being ground in the grinding stone of secularism since Independence".

The editor defended himself in relation to the first article by submitting that it was published inadvertently by an inexperienced staff in his absence. In respect of the second article, the editor defended it on merits that it offered a healthy and constructive criticism and added that if the Council was not satisfied with his explanation, he was willing to express his regret.

The Council held that the editor was entitled to express his opinion on social issues such as polygamy permitted by the Muslim personal law and to criticise the opposing views. But certain portions of the article transcended the bounds of journalistic propriety and

were calculated to embitter the feelings between the two communities. In view of the editor's qualified regret with reference to the second article, the Council proceeded on the basis that there was no apology or repentance. Holding that exaggerated reporting was no part of the freedom of the press, the Council said a small newspaper was subject to the same restraints as a big one and has no right to write such stuff. The editor was censured.

Conduct of editor disapproved⁴⁷

The Government of Mysore filed a complaint against the editor of Vikrama for publishing a substantial translation of an editorial in Mother India, an English monthly of Bombay. The Delhi Administration, acting under S. 99A of the Code of Criminal Procedure 1898,⁴⁸ had forfeited all the copies of Mother India. The complainant added that apart from the illegality of the publication, the article was capable of creating disharmony between the communities and as such

⁴⁷. 1969 Ann. Rep. 53-56.

⁴⁸. Corresponding to S. 95 in the 1973 Code empowering the State Government to declare certain publications forfeited and to issue search warrants for the same.

contravened the code of journalistic ethics.

The Council found that the matter published in Vikrama from Mother India was without any substantial change. It did not accept the submission of the editor that forfeiting copies of the newspaper concerned by the Delhi Administration was wrong. It had power to forfeit not only Mother India containing the original article but also any other publication containing extracts from or translation of the proscribed article.

The crucial question before the Council was whether the decision of the Delhi Administration that the matter published in Mother India was objectionable under the Code of Criminal Procedure was conclusive of the fact that Vikrama violated journalistic ethics by reprinting the impugned article. In the opinion of the Council, such publication would not only be illegal as offending the provision of the penal law, but also contrary to journalistic ethics. However, an article which is found to be unobjectionable by a court under the criminal law might still offend journalistic ethics. The position is clear that if a court of law determines that the publication was contrary to the provisions of the penal law, it will be the duty of the

Council to hold that the publication violated journalistic ethics and it will not make an inquiry into the merits of the legality of the article. The same result will follow if the government's order has become final in the absence of appeal to a court under the Code. The Council upheld the complaint and expressed disapproval of the conduct of the editor in publishing such an article.

Editor censured for communal bias⁴⁹

The General Secretary, Punjab and Sind Bank Officers' Federation, Patiala, complained against the editor of Chardi Kala Marg for the publication of a news item which tended to give communal colour to the conference held by the Federation at Patiala. It was further alleged that the news item created an atmosphere of hatred between the two communities, namely Hindus and Sikhs.

In reply to the show cause notice, the editor denied the charge of communal writing. He claimed his publication as a secular and independent one and that his reporting was based on facts recorded by the

⁴⁹. 1983(4) P.C.I. Rev. 42-45.

reporter and verified from the staff of the local branch of the Punjab and Sind Bank. According to him the conference of the complainant was a part of politically motivated anti-Sikh officers' agitation.

The Council found that the whole tenor and thrust of the article had a strong communal bias and was apt to produce hatred, ill-will and distrust between Hindus and Sikhs. The Council referred to the guidelines formulated by the erstwhile Press Council on communal writings. According to these guidelines "emphasising matters that are apt to produce communal hatred or fostering feeling of distrust between communities" offends journalistic propriety and ethics. The editor was censured and was required to publish the particulars of the inquiry.

RIGHT OF REPLY

Infraction of norms vindicated by publication of rejoinder (Indian Express, 1992-93 Ann. Rep. 218-221).

Editors offer to publish reply clarifying or contradicting the story (Chintha and Desabhimani, 1986 Ann. Rep. 99-100).

Correction without a word of regret carries no weight (Deccan Herald, 1983(2) P.C.I. Rev. 27).

Remarks about personal status to be avoided⁵⁰

Narinder Singh, a resident of Chandigarh, had sent for publication four letters written by Mr P V Narasimha Rao with the intention of projecting the new Prime Minister as one who is diligent enough to respond to every correspondence even from an ordinary citizen. Based on those letters, a write-up appeared in "Chandigarh Diary" of Indian Express dated 24 June 1991 with, according to Narinder Singh, taunting, defamatory and derogatory remarks. Though he had sent a contradiction, it was not published. Hence the complaint.

In the meantime, the newspaper published the contradiction which was not satisfactory to the

⁵⁰. 1992-93 Ann. Rep. 218-21.

complainant. The editor explained that the write-up was published in a column which carries reports intended to be taken in a lighter vein.

The gravamen of the complaint was directed against that part of the impugned publication in which the respondent had made fun of the complainant by depicting him as a 'small functionary' who 'describes himself variously - sometimes tourism promoter, sometimes sports promoter and sometimes as an upholder of Punjab's culture and tradition - as the occasion warrants'. The respondent pleaded that all this he did in a lighter vein, without any intent to denigrate the complainant.

The Inquiry Committee observed that all those - journalists included - who were committed to the constitutional goal of building an egalitarian society must shed the way of appraising the views of another in terms of his being a 'big' leader or 'small' fry. It will be apt to recall the words of a renowned author: 'that we all are plants buoyed up by the air vessels of our own conceit' and if we get a few pinches - even by way of fun - at the hands of another, the very quality for good goes out of us, and the reaction of the victim

recoils in the fun maker relegating the latter to the unenviable position of an agent provocateur. Therefore, it is always better part of the discretion, for a journalist to avoid such pinching remarks, even in fun, about the personal status of a person, where no overriding public interest is involved.

The Committee found that the infraction in the instant case was too trivial to warrant any action by the Press Council. Even this negligible infraction of journalistic ethics was sufficiently vindicated by the publication of the complainant's rejoinder by the newspaper. The complaint was dismissed.

Editor agrees to publish contradiction⁵¹

In his complaint dated 1 October 1984 against Chintha, a Malayalam weekly, and Deshabhimani, a Malayalam daily, Pavanan, president of the Kerala Yuktivadi Sangham, alleged that Mr E M S Namboodiripad while reviewing his book for Chintha had exceeded the limits of fair criticism. The situation, according to the complainant, was aggravated when Deshabhimani reproduced the impugned column written by the veteran

⁵¹. 1986 Ann. Rep. 99-100.

Marxist leader. Both the publications did not publish a reply sent by the complainant.

The editor explained that a reader had sent a book published by the Indian Athiest Publisher to Mr Namboodiripad and asked for his comments through the Question & Answer column. The book titled Yuktivicharam, written by the complainant, contained inter alia two articles "Marxism and Yuktivadam" and "EMS and Yuktivadam". Mr Namboodiripad critically reviewed the book with particular emphasis on the articles referred to above. It was published in Chintha. It was reproduced in Deshabhimani for the general public who had occasion to read the book. According to the editor, the impugned comments were within the legitimate limits of fair criticism. The editor added that he was not bound to publish the reply of the complainant as he had not asked him to comment on the review.

However, when the matter was considered by the Inquiry Committee, it was submitted on behalf of the editors that they were prepared to publish any reply the complainant wanted to get published in their newspapers, provided it was by way of clarification or

contradiction of any statement by Mr Namboodiripad. As it was a fair and reasonable submission, the Council disposed of the complaint on that basis.

Correction without apology or regret⁵²

The publication of a news item with a heading "Housewife raped - Robbed of jewels" in Deccan Herald was objected to by the complainant. He alleged that though no specific names had been mentioned, from the contents, which were totally false, it was clear to whom it referred. The editor stated that a translation in English of the original news item in Kannada had been sent to him by the correspondent. Some mistake had occurred in the course of translation resulting in the present cause of action. He emphasised that there had been no deliberate distortion, and when informed about the mistake, a correction had been duly published. The complainant, however, insisted in pursuing the matter since there had been no expression of apology or regret by the editor.

The Council was of the view that the correction published "without a word of apology or regret in the

⁵². 1983(2) P.C.I. Rev. 27.

circumstances of the case does not carry any weight". However, taking into account the subsequent publication of regret by the editor, the Council held that no further action was called for.

7

JOURNALISTIC IMPROPRIETY

Off the record statements not to be published⁵³

Probe in its 1981 October issue published an interview with Mr A B Vajpayee on the statements made by Dr Subramanian Swamy, stating that it "brings Dr Swamy and Shri Vajpayee 'face to face'". Mr Vajpayee alleged in his complaint that despite his refusal to give an interview, the magazine had published his informal talks in such a way that an impression was created as if he had given an interview. According to him it was a "talk in confidence" based on the understanding that it would not be published.⁵⁴

It was maintained on behalf of the editor that

⁵³. 1983(1) P.C.I. Rev. 37.

⁵⁴. Reference was made to the principle of privacy expounded in the Annual Report of the British Press Council (1976).

firstly there was no such understanding, and secondly, even without permission such talk could be published as it was in the public interest.

The Council took the view that on well-established principles⁵⁵ and practice any matter that had been discussed or disclosed to a journalist based on an understanding that such was not to be published, ought not to be so published. But this is subject to the following exceptions:

- (i) Consent is subsequently obtained for its publication; or
- (ii) the editor clarifies by way of an appropriate footnote that since the publication of certain matters were in the public interest, the statement or discussion in question was being published although it had been made "off the record".

The Council mentioned the opinion of R M Neal in his book News Gathering and News Reporting that in the

⁵⁵. It expounded the principles by referring to an adjudication of the British Press Council appearing in its 18th Annual Report (1971) and to R M Neal, News Gathering and News Writing. See supra note 52 at 39-40.

matter of "off the record requests" there is a difference between public and private meeting. In the case of the former, there is no question of "off the record" answers.

The Council upheld the contention of the complainant that the talk between him and the correspondent was at the confidential level with the clear understanding that it was not for publication. It was not open to the correspondent or editor to turn round and seek protection behind the argument of the publication being in the public interest. The complaint was upheld and the magazine was admonished.

Distortion and exaggeration of facts³⁶

The complainant, an Assistant Commissioner of Police, alleged that a news item with the heading "Marathi author battered" published in Free Press Bulletin's issue of 19 December 1980, gave a biased, distorted and exaggerated report of an incident occurring a few days earlier between S Sinkar, a Marathi writer, and a taxi driver. It stated that the writer was the victim of "merciless beating" by two constables of the Delisle

³⁶. 1983(1) P.C.I. Rev. 66.

Road Police Station.

The editor despite several reminders failed to submit his comments or any written statement. Also he did not appear before the Inquiry Committee.

The Council noted that though the complainant's letter had been published by the editor in his newspaper dated 12 January 1981, he appeared to have "deliberately avoided" his comments or written statement in spite of being served with a show-cause notice. From this, the Council inferred that perhaps he was unable to defend himself. It took the view that the complaint had substance as regards distortion and exaggeration of facts by the newspaper. The Council decided to warn the editor.

Obscenity and art, distinguished⁵⁷

The General Secretary of the Cine Film Reform Association of India alleged in his complaint that Debonair, an English magazine from Bombay, had violated the norms of healthy journalism by publishing semi-nude, obscene, sex-exciting and vulgar photographs in

⁵⁷. 1986 Ann. Rep. 217-18.

its January 1985 issue despite the Council reprimanding it earlier for publishing similar photographs.

Denying the charge that the impugned photographs tend to promote lasciviousness, the editor submitted in his written statement that those were published with a view to express the beauty and rhythm of the human body. Condemning the complainant for his total ignorance of present day standard of journalism, the editor pointed out that the photographs were the product of latest techniques in the field of photography.

At the time of hearing, the complainant had to concede that in view of the recent decision of the Supreme Court,⁵⁸ it could not be said that the impugned photographs were obscene. However, he argued that they were indecent and would hurt the dignity of women. The editor should have exercised restraint in the publication of such photographs in a magazine which would reach children and women who were in no position to discern and appreciate the art in them.

These arguments did not find favour with the

⁵⁸. Samaresh Bose v. Amal Mitra, 1985(4) S.C.C. 289.

Council. Following the decisions rendered by the erstwhile Press Council in the Statesman and Blitz cases⁵⁹, the Committee felt that the magazine had a limited readership confined to well informed people. The Committee was of the opinion that the photographs of semi-nude or nude female form in the magazine did not promote lasciviousness nor did they appeal to the prurient interest of the readers. The Committee was further of the opinion that the photographs were not indecent. They are works of art and have to be appreciated as such. They are not intended to offend public morality or to degrade public taste. Drawing a distinction between obscenity and art, the Council dismissed the complaint.

Censured for salacious writing⁶⁰

Shri Natwar Singh in his complaint alleged that Sunday, an English weekly magazine from Calcutta, had published two extremely defamatory and salacious articles in its issue dated 27 September 1992 describing him as a 'Copyright Chor' (thief) and in its issue dated 30 August 1992 describing him as a chamcha (sycophant).

⁵⁹. 1972 Ann. Rep. 81-88.

⁶⁰. 1992-93 Ann. Rep. 497-501.

The impugned article dealt with attempts made by Natwar Singh to please Ms Sonia Gandhi by publishing an unsolicited review of her book in Hindustan Times and the way in which he quoted extracts from the book without permission from the publisher.

The Inquiry Committee felt that the impugned comments in the two articles were in bad taste. Though the magazine had made a conditional offer of retraction in a letter addressed to the complainant, its written statement indicated the absence of any genuine regret for having described the complainant so strongly. Where a statement is per se defamatory, the onus is on the respondent to prove the charge; instead the magazine was trying to shift the burden of proof on the complainant. The Committee recommended to the Council to censure the respondent for its violation of well-established principles of both ethics and law. Accordingly the magazine was censured.

Transgressing norms of ethics⁴¹

Two separate complaints against Hitawada, an English daily of Bhopal, alleging that it resorted to unethical

⁴¹. 1980 Ann. Rep. 115-124.

practices like publishing dummy advertisements, plagiarism etc. The editor contended that the charges were false, mischievous, motivated and mala fide.

On receipt of information from advertisers, the Council upheld the complaint since the advertisements had neither been paid for nor authorised by the advertisers. Hence, the newspaper had transgressed the norms of journalistic ethics. A warning was issued to the editor to refrain from such publications in future.

Breach of ethics, complaint rejected⁴²

The complainant alleged that three different issues published on three different dates by The Hindu contravened good taste. Two of these related to reports and the third to publication of a photograph.

The Council held that in publishing news and photographs of worldwide interest, the newspaper had done its duty properly. By no means had it committed a breach of journalistic ethics or offended good taste. The complaint was rejected.

⁴². 1969 Ann. Rep. 14.

Editor's assurance accepted⁶³

Two complaints lodged against Mother India, an English monthly of Bombay, were considered together. The first complaint pertained to illustrations published in the April and May issues of the monthly. The second was in respect of certain replies given to questions that related to the President of India by name in the famous mail column of the magazine. Both the illustrations and replies were alleged to be in "extremely bad taste".

The editor, Baburao Patel, gave the assurance to the Inquiry Committee that such objectionable matter would not be published again.

While upholding the complaints, the Council decided to treat the matter as closed in view of the assurance given by the editor.

Frivolous nature of the complaint⁶⁴

In a communication to the Council, the complainant stated that the score in a cricket match reported in

⁶³. 1967 Ann. Rep. 43.

⁶⁴. 1968 Ann. Rep. 35.

Times of India, Ahmedabad, was incorrect, resulting in his sustaining a loss of Rs 10 in a bet. He demanded that he be reimbursed the amount by the newspaper. There was no mention of when and where the match was played nor of the correct score to prove the inaccuracy of the report.

Since no formal complaint was filed, the Council did not deem it necessary to express an opinion on the frivolous nature of the complaint and decided to close the matter.

Complaint against defunct newspaper⁶⁵

Three separate complaints were in respect of three articles which appeared in the now defunct Urdu daily Nawa-E-Shaam, published from Bangalore.

After carefully scrutinising the impugned articles, the Council found that they contained nothing to offend against journalistic ethics or to "whip up frenzy of communal elements". As regards a defunct newspaper, it laid down the following principle: Where a newspaper is charged with violation of journalistic

⁶⁵. 1968 Ann. Rep. 24, .

ethics, a plea that it has ceased publication, will not allow it to escape adjudication. Discontinuance of the paper affords the editor no defence since it is his conduct which is the subject of the complaint.

Articles found to be not in the best of taste⁶⁶

The subject matter of the Mahila Samaj complaint was two items appearing in Organiser, an English weekly of Delhi, dated 26 July 1969, which were alleged to be in bad taste as being derogatory to women in that they created the impression that women "should be kept out of positions of responsibility in the State". The Government of India objected to one item, namely, the article: "Women Rulers are Disastrous".

While he did not challenge the complainant's contentions as regards the central idea of the article, the editor submitted that "as a journalist he was entitled to express or publish views on matters of public importance".

The Council expressed its concurrence with the editor's submission stating that the press has the

⁶⁶. 1970 Ann. Rep. 15.

right to express opinions held by the editor or other journalists, even if representing a small minority view. But this was subject to the qualification that the published matter did not contravene the "standard of journalistic ethics or public taste". The impugned articles, the Council felt, stigmatised "a major segment of the Indian population as not worthy of any place in public life because of its sex" and as such could not be said to be in the best of taste.

Part Four

GUIDE, ADVISER AND ALLY

Chapter 15

SUMMING UP

15.1 The history of the Press Council falls into two phases. The first began with its institution in 1966 and ended ten years later when it was abolished during the emergency; the second is the present era which began in 1978 when the Council was restored by the Janata Government. Both these phases need to be considered separately, for chronological and historical reasons, though the two phases are inseparable by a common thread of similar perspectives and objectives.

The First Phase

15.2 Though the First Press Commission, in its report submitted to the Government in 1954, had recommended the setting up of an all-India Press Council, it did not come into being until more than 12 years thereafter. The legislative exercise for constituting the Council by statute was over only in 1965. Even thereafter it took another eight months to

establish it; and the Council did come into being on 4 July 1966. The list of members of the first Council was gazetted on 16 November 1966 - ten years and four months after the bill for its creation was first introduced in Parliament.

15.3 Once the Press Council had been established its members accepted the challenge to make it work. Mr Justice J R Mudholkar, a sitting judge of the Supreme Court, was appointed as the Council's first Chairman. His personality and prestige proved of great value in getting a tentative and uncertain project launched. Unfortunately his term was a short one, and to the genuine regret of all his colleagues he was obliged to resign after only one year of office following a controversy over the composition, powers and functions of the Council in which he was accused of being unhelpful. During that time he made the Council's purpose clear and gave direction to its work. The aim, as he saw it, was the development of a body as the guardian of the press.¹ The press had to be free, but it had also to be trustworthy. The Council's appeal would be conscience and fair play.

¹. Mudholkar, Tagore Law Lecture, Press Law, p. 127.

15.4 Mr Justice N Rajagopala Ayyangar, a retired judge of the Supreme Court, succeeded Mr Justice Mudholkar as Chairman. Both these gentlemen were highly respected in their profession; and they used their best endeavours to realise the principles for which the Council stood. The Council had need of such men during the years of its infancy.

15.5 A 20-member Advisory Committee with the Minister of Information and Broadcasting as chairman was constituted in early 1968 to "study the existing Act under which the Press Council of India has been set up and to suggest such amendments as may be considered necessary to enlist for the Council full and effective cooperation from all sections of the press and the public and to enable it to play its due role in preserving the freedom of the press and improving the standards of journalism in the country which are in conformity with the basic objectives of the Council." In response to a request from the committee, the Council submitted a memorandum on its functions and powers in the light of the experience gained during a year and a half of its existence till then but decided not to say anything in regard to its composition which was a matter for Parliament to decide. The committee

submitted its report on 31 October 1968. Both the term of the Council and of the Chairman was extended by an ordinance up to 31 March 1970. An amending bill based on the recommendations of the Advisory Committee was passed by Parliament in 1970 and the new Council was nominated under a revised procedure laid down in the amended Act.

15.6 The original quagmire over the nomination of members persisted even under the amended Act as a result of which the term of the Council had to be extended by an ordinance for a period of six months in 1973. Later it was extended twice i.e., up to the end of 1975. Meanwhile, internal emergency was clamped on the country and press freedom was curbed. The Press Council was abolished by an ordinance and it ceased to exist from 1 January 1976.

15.7 For the great amount of work the Press Council was supposed to do, the budget was pitifully low. In order to make the Council financially viable and autonomous, the 1978 Act gave it the power to levy fees on newspapers and news agencies having regard to their circulation and other matters. Under the earlier Act, the Council was wholly dependent for funds on the

payments made by the Central Government. The income/expenditure of the Council for the years 1968-73 will show that the working of the Council was under severe budgetary constraint.

Press Council Budget²

Year	Income or Expenditure	Pay of officers	Estt	Allowances	Pen sion	Contin- gency
1968 ..	Rs 3,01,316 Rs 2,38,815					
1969 ..	Rs 2,67,390	53,215	38,177	76,885	22,562	47,720
1970 ..	Rs 4,39,967	65,437	40,361	85,529	36,001	1,83,804
1971 ..	Rs 3,61,787	69,374	33,124	1,06,125	19,301	1,17,959
1972 ..	Rs 3,79,158	78,731	36,135	90,041	20,646	1,39,354
1973 ..	Rs 3,97,769	75,481	39,502	1,02,219	15,274	1,32,901

15.8 Though the budget was increased slightly in 1970, it was brought down the next year. After paying the salaries and meeting the establishment charges, precious little was left for actual investigation and research. Given its budget, it could not really do much more than perform its adjudicatory functions. Now the position is changed. Rule 1C of the Press Council Act 1978 empowers the Council to levy fees at the rates ranging from Rs 100 to Rs 7,500 per annum depending on the circulation of the newspapers/periodicals or the class of news agency. No fee is levied on papers with

². Source: Annual Report of the Press Council: 1968, 1969, 1970, 1971, 1972, 1973. The 1973 Annual Report is the last report available before the dissolution of the Council in 1976.

circulation of less than 5,000 copies. Any fee payable to the Council is recoverable as arrear of land revenue. The Central Government also continues to make grants to the Council. During 1992-93 the Council received grants aggregating to Rs 34.13 lakhs and an amount of Rs 16.67 lakhs was realised as fees from newspapers/news agencies. Besides this the Council also had an unspent balance of Rs 1.38 lakhs as on 1 April 1992.

15.9 The complaints jurisdiction of the Council constitutes its most important function. A comparatively accurate scenario of the exercise of this jurisdiction can be gleaned from the Annual Reports. The following table sets out some statistical information relating to the First Phase.

Complaints before the Council

Year	Total No. of complaints	By the State	Against the State
1967	29	(not known)	5
1968	32	14	3
1969	77	44	5
1970	58	26	11
1971	60		17
1972	125		22
1973	96		32
1974	95		39

15.10 During 1992-93 the Council registered 758 cases out of which 242 were against authorities and 516 were against the press. This trend was evident from the very beginning. The government was the principal complainant against the press and the Press Council was being used whenever it was dissatisfied with a report in a newspaper. Though this was contrary to what was envisaged, the 1967 Annual Report of the Council identified the Home Ministries of the Central and State Governments as the principal ministries invoking the complaint jurisdiction of the Council against the press. In the Andhra Prabha case the editor had to tender an apology to the Chief Minister of Orissa;³ and in the Mother India case the editor gave an undertaking - which was accepted by the Ministry of Home Affairs - that he would not repeat the offence.⁴ In 1968 the Council considered 32 complaints, 29 of them pertaining to violation of journalistic ethics or publication of matter offending against public taste. Fourteen of these complaints were filed by the State Governments, the rest being those referred to it by the public. The number of complaints steadily grew to 108 against newspapers and 32 against the state governments

³. (1967) A.R. 39.

⁴. Ibid.

and others in 1972. There was a general feeling that the machinery of the Press Council was increasingly and deliberately being used by the government to increase rather than decrease its control over the press. However, timely steps were taken by the Council itself to reverse this trend.

15.11 As stated earlier, the Press Council Act, both original and current, lay great stress on the need to help newspapers to maintain their independence and to ensure high professional standards.⁵ These functions have naturally constituted most of the work of the Council. This extension of the Council's jurisdiction was opposed; the Advocate-General of Haryana was of the opinion that such inquiries were outside its scope.⁶ Mr Justice Ayyangar, the then Chairman of the Council, wrote a spirited and judicious defence of this jurisdiction, echoing the assertion made by the Council in its second Annual Report:

⁵. S. 12, Press Council Act, 1965. Now see S. 19, Press Council Act, 1978.

⁶. (1970) A.R. (v)-(vi). The question arose in respect of a complaint made by the Tribune against the Chief Minister of Haryana stopping government advertisements to the paper.

Press Councils, wherever they exist, have come to be regarded mainly as a watch-dog on the conduct of newspapers and persons who produce them. With consideration of ethical questions relating to the press as its primary concern, a Press Council functions as a defender of the press freedom and exposes the basis of that freedom. Other duties listed in this charter are either considered incidental or performed in the projection of their proper role.⁷

By 1971, the Council felt sufficiently secure in this jurisdiction to express its displeasure at this jurisdiction being questioned.⁸ This led to the criticism in some quarters that the Council was laying more or almost exclusive emphasis on these functions to the neglect of other functions. But, if the Council's fundamental role is to safeguard the freedom of the press and to ensure that this freedom is not to be regarded as a licence by any section of the press, then it is legitimate for the Council to pay maximum attention to the adjudications of cases of assaults on the freedom of the press from the government and other elements on the one hand and to the cases relating to

7. (1967) A.R. 6.

8. (1971) A.R. 27-31 (once again on the Tribune case - supra note 6).

infraction by newspapers and journalists of the code of conduct and the writings offending against public taste.

15.12 The most significant aspect of the Council's complaint jurisdiction is the pathology of its use. It has been used by a large variety of people for diverse purposes. When the Council was first established in 1966, it evolved an ambitious programme involving the evolution of a code of conduct,⁹ a scheme for the training of journalists,¹⁰ reviewing the concentration of ownership patterns in the press¹¹ and looking at the problem of parliamentary privilege and the press¹². The Council's adjudications have helped build up a good case law serving as a code of conduct; apart from it, it abandoned the attempt to create a code of ethics, hoping to create such a code through its case work.¹³ As far other areas were concerned, the Council with its scarce resources was not in a position to cope up with its multiple tasks.

⁹. (1966) A.R. 4.

¹⁰. Ibid, 4-5.

¹¹. Ibid, 5.

¹². Ibid, 6-7.

¹³. (1967) A.R. 59-63.

Slowly it became a lobbying organisation. It suggested improvements in a number of laws concerning the press including the law relating to contempt of court.

15.13 A renovated Press Council was set up in 1970. It was a time when the thunders of an imminent confrontation between the press and the government were audible in the distant horizon.¹⁴ The mounting tension between the Government and the corporate press, aggravated by the defeat of the Government in the famous newsprint supply case,¹⁵ has had its resounding effect on the Press Council. In her pitched battle with the press and the opposition, Mrs Indira Gandhi scored a strategic point when an internal emergency was proclaimed under Art 352 of the Constitution; and the very first act under the emergency was to impose pre-censorship on the press. The Press Council had become infructuous and its continuance as a guide, adviser and ally of the press had become an anachronism. The Government wanted an alibi to abolish it; and it was done on the plea that "it was not able to carry on its functions effectively

¹⁴. See Bennett Coleman Ltd v. Union of India, A.I.R. 1973 S.C. 106.

¹⁵. Ibid.

to achieve the objects for which it was established".

The Second Phase

15.14 The Press Council was resurrected after the emergency with the enactment of the Press Council Act 1978. Justice A N Grover, who resigned from the Supreme Court following his supersession during Mrs Gandhi's regime, was appointed as Chairman.

15.15 The Council's power to finance itself through a levy on the press has resulted in the augmentation of its budget. Apart from offsetting the inflationary losses, it would lessen the Council's dependence on the Government. However, the ambivalence of the media is tangible in the non-payment of the statutory levy: the Council could collect Rs 16.67 lakhs as fee for the year 1992-93 whereas arrears for the period would come to Rs 8.20 lakhs.

15.16 Compared with its previous workload (1966-75), there is no doubt that the workload of the Council has increased. During 1992-93, no less than 758 complaints were received by the Council. Of these, 242 were complaints against the authorities for

jeopardising the freedom of the press or the exercise of the complainant's legitimate journalistic functions, and the remaining 516 were against the press for violation of the norms of journalistic ethics and good taste. With the addition of 421 matters pending from the previous year, the Council was required to consider a total of 1,179 cases. The total number of cases disposed of during this period was 828, including 266 cases in which adjudications were rendered after full inquiry, while the remaining 562 were summarily disposed of on preliminary grounds such as lack of sufficient grounds for inquiry, or non-prosecution, abandonment or withdrawal by the complainant, or its settlement between the parties at the initial stage, or the matter having become sub-judice in a court of law. The year 1991-92 opened with 331 pending cases and the number of cases filed during the year was 574. Out of this 125 cases were adjudicated and 358 were dismissed at the preliminary stage.

15.17 A careful analysis of the adjudications reported in the Annual Reports would reveal that it is the government which is the largest and most effective complainant to use the jurisdiction of the Council against the press. This may seem a paradox because the

basic justification for the establishment of the Council was as a bulwark against encroachments against freedom of the press. A positive aspect, however, is the inclination of the government and other authorities to approach the Council instead of approaching the courts with all sorts of complaints against the press.

Has the Council failed?

15.18 There is a vociferous criticism against the Press Council that it has failed in its duties and functions. This class of critics seriously doubt, if not outrightly reject, its utility. Rajeev Dhavan concludes his essay on Press Council with a caustic remark that the case of the press has to be considered without the window dressing of the Press Council.¹⁶

15.19 The Council may not have fully lived up to the expectations bestowed on it; but it will be unfair and far from the truth to say that it has become a futile institution. Any exercise in this regard has to be made on the basis of the twin objective of the Council: (1) Preservation of the freedom of the press

¹⁶. Rajeev Dhavan, Only the Good News (New Delhi: Manohar, 1987), p. 439.

and (2) Maintaining and improving the standards of newspapers. The first object required the Council to remain and act as a vigilant sentinel against any invasion on press freedom. The Council was also charged with a duty to help newspapers and news agencies maintain their independence. It was further asked to keep under review any development likely to restrict the supply and dissemination of news of public interest and importance.

15.20 As would be seen from the case book¹⁷, the Council has entertained a good number of complaints against public authorities alleging attempts to invade the independence and freedom of the press. These complaints ranged from the cases of various types of excesses actually committed or sought to be committed on individual journalists to the stoppage of advertisements to newspapers in order to pressurise them into toeing the line of the government. Apart from this, over the years, the Council has acquired broad hybrid functions as a mediator between the government and the press. It has done a bit of lobbying on parliamentary privileges, defamation and contempt of court.

¹⁷. Supra Ch. 14, p. 229.

15.21 The second objective of maintaining and improving the standards of newspapers entailed a number of functions which the Press Council was required to perform. These included building up of a code of conduct for newspapers and news agencies and journalists in accordance with high professional standards; to ensure on the part of the press the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship; to encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism; to provide facilities for the proper education and training of persons in the profession; to study developments tending towards monopoly or concentration of ownership including a study of the ownership or financial structure of newspapers and news agencies and, if necessary, to suggest remedies; to promote technical or other research; to keep under review cases of assistance received by any newspaper from any foreign source; and to undertake studies of foreign newspapers including those brought out by any embassy or other representative of a foreign state, their circulation and impact.¹⁸

¹⁸. Section 13(2) of the Press Council Act, 1978.

15.22 One of the main points of criticism against the Press Council has been that it has not laid down a code of conduct for the press as enjoined by S. 13(2) (b) of the Act and as suggested by the First Press Commission in 1954. But, as has been explained in Chapter 6 of this thesis¹⁹, the Council thought it wise to 'build up' and not to 'formulate' such a code. This view has not only been endorsed by the Second Press Commission but it has held that formulation of the code with one stroke would be undesirable. Indeed, as pointed out by Dr Trikha,²⁰ the Indian press has become highly suspicious and apprehensive of the framing of the code after its unsavoury experience during the 1975-77 emergency when a government-inspired code was sought to be thrust on it. Even those people who at one time wanted a clear-cut code of ethics to be formulated are now in favour of its gradual evolution over the years from the ever-growing case book of adjudications. Therefore, it cannot be considered a failure on the part of the Council if it has not produced a tangible code.

¹⁹. Supra p. 81.

²⁰. N K Trikha, The Press Council (Bombay: Somaiya, 1986), p. 107.

15.23 As part of this endeavour, the Council released in 1992 'A Guide to Journalistic Ethics' which is a succinct compilation of the principles sorted out from the adjudications of the Council and the guidelines issued by it in their wake. Many of the basic principles set out in this Guide are in substance universally recognised. These are not cast-iron statutory rules but broad general principles which if applied with due discernment and adaptation to the varying circumstances of each case will help the journalist to self-regulate his or her conduct along the path of professional ethics. This Guide was presented to the Third International Conference of Press Councils and Similar Bodies held in New Delhi in October 1992 when the conference was in the process of considering a proposal to lay down a code. Adopting the Guide, the Conference urged other press councils to emulate the Indian pattern and build up similar guides out of their decisions.

15.24 Our study does not warrant the conclusion that the Press Council has failed in its objectives. We can legitimately be proud of our Council that in certain aspects it outshines the British Press Council which is the model for many other press councils in the

world. However, it will be better if we take earnest steps to further tone it up so that it will continue as a sentinel against draconian restrictions which the governments might seek to impose on the press.

S.U.G.G.E.S.T.I.O.N.S

A. Status and structure

15.25 Being a statutory creature is the greatest advantage of the Indian Press Council. It should not only be retained but strengthened by making a provision for compulsory placement of adjudications of the Council in Parliament or the State legislatures. Though the domination of the political executive is discernible, the in-built safeguards in respect of nomination of members enable the Council to remain free from the interference and influence of the government. Being a statutory body, the Council is conferred with power to summon and enforce the attendance of persons and examining them on oath as also to require the discovery and inspection of documents. It has also power to receive evidence on affidavit, to requisition any public record or copies thereof from any court or office and to issue commissions for the examination of

witnesses or documents. At the same time newspapers and newspapermen are exempted from compulsory disclosure of their source of information which is a wholesome provision not available in other countries. The creation of a free and autonomous body by statute is a unique experiment and we have succeeded in it.

15.26 There is a suggestion to establish regional press councils, leaving the central council as an appellate body. Though seem to be tenable in the context of the regional language press, such regional councils with an appellate forum will further aggravate the problem of delay. Even now the prolonged and protracted proceedings are causing great annoyance and sometimes a feeling of disgust. An adjudication long after the damage caused by an irresponsible publication will be futile. The Inquiry Committee sitting in various regions can be taken as a substitute for the establishment of regional councils. More Inquiry Committees can be set up and hearings can be held on complaints emanating from a particular region at a place located in that region.

15.27 There is a suggestion to make the Council a permanent body (like the Upper House of Parliament)

with provision for triennial retirement of half of the membership in various categories. Though nothing critical can be said of the present method of nomination of members, care should be taken to give representation to all regions. A situation emerged in 1982 when all the seven working journalists other than editors happened to belong to Delhi and all of them were special correspondents. In the present Council, five out of the seven working journalists are from Delhi and one each from Lucknow and Calcutta. The regional imbalance is distressingly evident with only two members (Dr M V Pylee and Shri K M Mathew) to represent the entire South. In keeping with the spirit of the federal set-up in India, representation from different regions can be statutorily provided for.

B. Powers and functions

15.28 For the effective functioning of the Press Council, it should be given some teeth based on the principle of the golden mean between moral and punitive sanctions. While mere moral sanctions may not be sufficient in hard cases, conferment of punitive powers is more dangerous. The Council has undergone three phases of thinking on the subject. Under the

chairmanship of Justice A N Grover penal powers were considered desirable and necessary; under the chairmanship of Justice A N Sen such powers were not at all needed and, if given, could be misused by the government; under Justice Sarkaria's chairmanship these became necessary once again. However, under Justice Sawant, the present chairman, the Council is not seeking any such power. If the Council began penalising the parties, Justice Sawant says, they would immediately approach the courts leading to prolonged litigation defeating its objective of providing speedy relief.²¹ It is our considered opinion that the Council should assume power to recommend payment of cost and compensation at the time of deciding a case. In case of default, the Council should have the power to recommend to journalists' associations to cancel the membership of the defaulters. The Council should also have the power to recommend cancellation of government advertisements and other privileges if a newspaper was found guilty twice within a span of three years.

15.29 In order to make the Press Council an effective body all those engaged in the profession of

²¹. The Hindu, 14 October 1995, p.6. For a detailed discussion on this aspect, see ch. 5, p. 64.

journalism shall be brought under its disciplinary authority. Though we have made out a case in chapter 5 against making journalism a closed profession, a beginning can be made by bringing all those journalists who come within the statutory definition of a "working Journalist"²² under the disciplinary control of the Council as in the case of other similar statutory bodies entrusted with the responsibility of maintaining professional standards like the Indian Medical Council and the Bar Council of India. The Press Council shall be given power, beyond the power of warning or censuring delinquent journalists,²³ to remove a member from the profession for professional misconduct and violation of professional ethics in line with similar power enjoyed by the Bar Council²⁴ and the Medical Council²⁵.

²². Section 2(f) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955 defines a working journalist thus: "working Journalist" means a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any newspaper establishment, and includes an editor, a leader writer, news editor, subeditor, feature writer, copy tester, reporter, correspondent, cartoonist, news photographer and proof reader...

²³. Section 14(1) of the Press Council Act.

²⁴. Section 35 of the Advocates Act, 1961.

²⁵. Section 24 of the Indian Medical Council Act.

15.30 All laws affecting the press should first be referred for the opinion of the Council. Modifications shall be effected in existing laws relating to parliamentary privileges, contempt of court, defamation, official secrets etc as suggested by the Press Council and narrated in earlier chapters.²⁶

15.31 The Council should have the power to order immediate correction of glaring misstatements published in a newspaper. This is important as otherwise irreparable damage would be done to the reputation and prestige of an individual or an institution by the time an adjudication is pronounced by the Council.

C. Procedure and performance

15.32 Efforts should be made to cut short the delay in the pronouncement of adjudications. The process can be expedited by reducing the number of adjournments and pronouncing ex parte decisions with an opportunity for the affected party to appeal. The number and frequency of regional sittings can be increased to enable the parties to pursue the cases

²⁶. See ch 7 (The press and parliament) p. 90; ch 8 (Contempt of court) p. 108; and ch 12 (Official secrets) p. 181.

effectively.

15.33 Since the Council has rejected a suggestion to constitute regional councils,²⁷ care should be taken to ensure regional representation in the Council. This will be in tune with the spirit of federalism to which our nation is committed.

15.34 The Council shall be bold enough to pass severe indictments against the authorities which would enhance its dignity and moral authority. Only such steps would remove the general feeling that the Council is an ineffective body as against mighty authorities.

15.35 The Council should ensure publication of its adverse adjudications in a proper manner and follow-up actions shall be kept under constant review. The secretariat may address the concerned authorities and professional organisations about non-implementation or improper or inadequate implementation of its decisions. The result of this surveillance may be published in the Annual Report.

15.36 The Council should indulge more often in the

²⁷. (1990-91) Ann. Rep. 90-91.

initiation of suo motu action. To avoid the allegation of motivated action, this can be done only by consensus instead of by a majority decision. Since the suo motu inquiry is conducted on behalf of the whole Council, it should have the sanction and willing support of all the members.

15.37 Though an autonomous body, 70 per cent of the Council's funds are received in the form of grants while the remaining 30 per cent is collected as a levy from the newspapers.²⁰ The Council is empowered to levy fees at the rates ranging from Rs 100 to Rs 7,500 per annum depending on the circulation of newspapers/periodicals; newspapers having a circulation up to 5,000 copies exempted. Even this small amount is not being paid regularly by several newspapers; the arrears pending against them have gone up to Rs 52 lakhs. In order to make payments prompt the newspapers should be asked to produce a "no dues certificate" from the Council before receiving payment for government advertisements.

²⁰. The Council received grant-in-aid amounting to Rs 34.13 lakhs during the financial year 1992-93 from the Central Government, collected Rs 16.67 lakhs as fees from newspapers/periodicals and news agencies and had Rs 3.12 lakhs as other miscellaneous receipts like interest on bank account etc. See (1992-93) Ann. Rep. 661.

Complaints against TV and radio

15.38 The broadcasting industry has no equivalent of the Press Council though the television channels, including the government-owned Doordarshan and All India Radio, have never been above criticism. With more and more channels, both foreign and national, crowding our airwaves, the formation of a controlling agency has become imperative.²⁹ If a Complaints Commission is established to deal exclusively with complaints relating to the electronic media, it, along with the Advertisement Standards Council of India, would be a fitting corollary or an ideal collaborator with the Press Council of India in ushering and ensuring a free market of ideas with a better deal for the buyers and sellers.

²⁹. In 1977 the Annan Committee on the Future of Broadcasting in Britain recommended the establishment of a statutory body which would sit in public in order to investigate and decide upon complaints from the public. The result in 1981 was the establishment of the Broadcasting Complaints Commission (BCC). See, Tom G Drone, Law and the Media (Oxford: Heinemann, 1989), pp 184-185.

Appendix A

THE PRESS COUNCIL ACT, 1978

1

(7th September 1978)

An Act to establish a Press Council for the purposes of preserving the freedom of the Press and of maintaining and improving the standards of newspapers and news agencies in India.

Be it enacted by Parliament in the twenty-ninth year of the Republic of India as follows:

CHAPTER I

Preliminary

Short title and extent

1. (1) This Act may be called the Press Council Act, 1978; (2) It extends to the whole of India.

Definitions

2. In this Act, unless the context otherwise requires,
- (a) "Chairman" means the Chairman of the Council;
 - (b) "Council" means the Press Council of India established under section 4;
 - (c) "Member" means a member of the Council and includes its Chairman;
 - (d) "Prescribed" means prescribed by rules made under this Act.

25 of 1867/45 of 1955

¹Published as Act 37 of 1978 in the Gazette of India Part II, Section 1 (8 September 1978).

- (e) The expression "editor" and "newspaper" have the meanings respectively assigned to them in the Press and Registration of Books Act, 1867, and the expression "working journalist" has the meaning assigned to it in the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

Rule of construction respecting enactments not extending to the State of Jammu and Kashmir or Sikkim.

3. Any reference in this Act to a law which is not in force in the State of Jammu & Kashmir or Sikkim shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State.

CHAPTER II

Establishment of the Press Council

Incorporation of the Council

4. (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be established a Council by the name of the Press Council of India.

(2) The said Council shall be a body corporate having perpetual succession and a common seal and shall by the said name sue and be sued.

Composition of the Council

5. (1) The Council shall consist of a Chairman and twenty eight other members.

(2) The Chairman shall be a person nominated by a Committee consisting of the Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council under sub-section (6) and the nomination so made shall take effect from the date on which it is notified by the Central Government in the Official Gazette.

(3) Of the other members_

- (a) thirteen shall be nominated in accordance with such procedure as may be prescribed from among the working journalists, of whom six shall be editors of newspapers and the remaining seven shall be working journalists other than editors, so, however, that the number of such editors and working journalists other than editors in relation to newspapers published in Indian languages shall be not less than three and four respectively;
- (b) six shall be nominated in accordance with such

- procedure as may be prescribed from among persons who own or carry on the business of management of newspapers, so, however, that there shall be two representatives from each of the categories of big newspapers, medium newspapers and small newspapers;
- (c) one shall be nominated in accordance with such procedure as may be prescribed from among persons who manage news agencies;
 - (d) three shall be persons having special knowledge or practical experience in respect of education and science, law and literature and culture of whom respectively one shall be nominated by the University Grants Commission, one by the Bar Council of India and one by the Sahitya Academy;
 - (e) five shall be members of Parliament of whom three shall be nominated by the Speaker from among the members of the House of the People (Lok Sabha) and two shall be nominated by the Chairman of the Council of States (Rajya Sabha) from among its members;

Provided that no working journalist who owns, or carries on the business of management of, any newspaper shall be eligible for nomination under clause (a);

Provided further that the nominations under clause (a) and clause (b) shall be so made that among the persons nominated there is not more than one person interested in any newspaper or group of newspapers under the same control of management.

Explanation: For the purposes of clause (b), a "Newspaper" shall be deemed to be_

- (i) "big newspaper" if the total circulation of all its editions exceeds fifty thousand copies for each issue;
- (ii) "medium newspaper" if the total circulation of all its editions exceeds fifteen thousand copies but does not exceed fifty thousand copies for each issue;
- (iii) "small newspaper" if the total circulation of all its editions does not exceed fifteen thousand copies for each issue.

(4) Before making any nomination under clause (a), clause (b) or clause (c) of sub-section (3), the Central Government in the case of the first Council and the retiring Chairman of the previous Council in the case of any subsequent Council shall, in the prescribed manner, invite panels of names comprising twice the number of members to be nominated from such associations of persons of the categories referred to in the said clause (a), clause (b) or clause (c) as may be notified in this behalf by the Central Government in the case

of the first Council and by the Council itself in the case of subsequent Councils;

Provided that where there is no association of persons of the category referred to in the said clause (c), the panels of names shall be invited from such news agencies as may be notified as aforesaid.

(5) The Central Government shall notify the names of persons nominated as members under sub-section (3) in the Official Gazette and every such nomination shall take effect from the date on which it is notified.

(6) The members of the Council notified under sub-section (5) shall elect from among themselves in accordance with such procedure as may be prescribed a person to be a member of the Committee referred to in sub-section (2) and a meeting of the members of the Council for the purpose of such election shall be presided over by a person chosen from among themselves.

Term of office and retirement of members

6. (1) Save as otherwise provided in this section, the Chairman and other members shall hold office for a period of three years;

Provided that the Chairman shall continue to hold such office until the Council is reconstituted in accordance with the provisions of Section 5 or for a period of six months whichever is earlier.

(2) Where a person nominated as a member under clause (a), clause (b) or clause (c) of sub-section (3) of Section 5 is censured under the provisions of sub-section (1) of Section 14, he shall cease to be a member of the Council.

(3) The term of office of a member nominated under clause (e) of sub-section (3) of Section 5 shall come to an end as soon as he ceases to be a member of the House from which he was nominated.

(4) A member shall be deemed to have vacated his seat if he is absent without excuse, sufficient in the opinion of the Council, from three consecutive meetings of the Council.

(5) The Chairman may resign his office by giving notice in writing to the Central Government, and any other member may resign his office by giving notice in writing to the Chairman, and upon such resignation being accepted by the Central Government, or as the case may be, the Chairman or the member shall be deemed to have vacated his office.

(6) Any vacancy arising under sub-section (2), sub-section (3), sub-section (4) or sub-section (5) or otherwise shall be filled, as soon as may be, by nomination in the same manner in which the member vacating office was nominated and the member so nominated shall hold office for the remaining period in which the member in whose place he is nominated would have held office.

(7) A retiring member shall be eligible for renomination for not more than one term.

Conditions of service of members

7. (1) The Chairman shall be a whole-time officer and shall be paid such salary as the Central Government may think fit; and the other members shall receive such allowances or fees for attending the meetings of the Council, as may be prescribed.

(2) Subject to the provisions of sub-section (1), the conditions of service of members shall be such as may be prescribed.

(3) It is hereby declared that the office of a member of the Council shall not disqualify its holder for being chosen, as, or for being, a member of either House of Parliament.

Committees of the Council

8. (1) For the purpose of performing its functions under this Act, the Council may constitute from among its members such Committees for general or special purposes as it may deem necessary and every committee so constituted shall perform such functions as are assigned to it by the Council.

(2) The Council shall have the power to co-opt as members of any committee constituted under sub-section (1) such other number of persons, not being members of the Council, as it thinks fit.

(3) Any such member shall have the right to attend any meeting of the committee on which he is so co-opted and to take part in the discussions thereat, but shall not have the right to vote and shall not be a member for any other purpose.

Meetings of the Council and Committees

9. The Council or any committee thereof shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by regulations made under this

Act.

Vacancies among members or defect in the constitution not to invalidate acts and proceedings of the Council.

10. No act or proceedings of the Council shall be deemed to be invalid by reason of the existence of any vacancy in, or any defect in the constitution, of the Council.

Staff of the Council

11. (1) Subject to such rules as may be made by the Central Government in this behalf, the Council may appoint a Secretary and such other employees as it may think necessary for the efficient performance of its functions under this Act.

(2) The terms and conditions of service of the employees shall be such as may be determined by regulations.

Authentication of orders and other instruments of the Council

12. All orders and decisions of the Council shall be authenticated by the signature of the Chairman or any other member authorised by the Council in this behalf and other instruments issued by the Council shall be authenticated by the signature of the Secretary or any other officer of the Council authorised in like manner in this behalf.

CHAPTER III

Powers and Functions of the Council

Objects and functions of the Council

13. (1) *The objects of the Council shall be to preserve the freedom of the press and to maintain and improve the standards of newspapers and news agencies in India.*

(2) The Council may, in furtherance of its objects, perform the following functions, namely:

- (a) to help newspapers and news agencies to maintain their independence;
- (b) to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards;
- (c) to ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship;

- (d) to encourage the growth of a sense of a sense of responsibility and public service among all those engaged in the profession of journalism;
- (e) to keep under review any development likely to restrict the supply and dissemination of news of public interest and importance;
- (f) to keep under review cases of assistance received by any newspaper or news agency in India from any foreign source including such cases as are referred to it by the Central Government or are brought to its notice by an individual, association of persons or any other organisation;
 Provided that nothing in this clause shall preclude the Central Government from dealing with any case of assistance received by a newspaper or news agency in India from any foreign source in any other manner it thinks fit;
- (g) to undertake studies of foreign newspapers, including those brought out by any embassy or other representative in India of a foreign State, their circulation and impact.

5 of 1980

Explanation - For the purposes of this clause the expression "foreign State" has the meaning assigned to it in section 87A of the Code of Civil Procedure, 1908.

- (h) to promote a proper functional relationship among all classes of persons engaged in the production or publication of newspapers or in news agencies.

14 of 1947

Provided that nothing in this clause shall be deemed to confer on the Council any functions in regard to disputes to which the Industrial Disputes Act, 1947 applies;

- (i) to concern itself with developments such as concentration of or other aspects of ownership of newspapers and news agencies which may affect the independence of the Press;
- (j) to undertake such studies as may be entrusted to the Council and to express its opinion in regard to any matter referred to it by the Central Government;
- (k) to do such other acts as may be incidental or conducive to the discharge of the above functions.

Power to Censure

14. (1) Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or a working journalist has committed any professional misconduct the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be;

Provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.

(2) If the Council is of the opinion that it is necessary or expedient in the public interest so to do, it may require any newspaper to publish therein in such manner as the Council thinks fit, any particulars relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

(3) Nothing in sub-section (1) shall be deemed to empower the Council to hold an inquiry into any matter in respect of which any proceeding is pending in a court of law.

(4) The decision of the Council under sub-section (1), or sub-section (2) as the case may be, shall be final and shall not be questioned in any court of law.

General Powers of the Council

5 of 1908

15. (1) For the purposes of performing its functions or holding any inquiry under this Act, the Council shall have the same powers throughout India as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters:-

- (a) summoning and enforcing the attendance of persons and examining them on oath;
- (b) requiring the discovery and inspection of documents;
- (c) receiving evidence or affidavits;
- (d) requisitioning any public record or copies thereof from any court or office;
- (e) issuing commissions for the examination of witnesses or documents; and
- (f) any other matter, which may be prescribed.

(2) Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.

45 of 1860

(3) Every inquiry held by the Council shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

(4) The Council may, if it considers it necessary for the purpose of carrying out its objects or for the performance of any of its functions under this Act, make such observations, as it may think fit, any of its decisions or reports respecting the conduct of any authority, including Government.

Levy of Fees

16. (1) The Council may, for the purpose of performing its functions under this Act, levy such fees at such rates and in such manner, as may be prescribed, from registered newspapers and news agencies and different rates may be prescribed for different newspapers having regard to their circulation and other matters.

(2) Any fees payable to the Council under sub-section (1) may be recovered as an arrear of land revenue.

Payments to the Council

17. The Central Government may, after due appropriation made by Parliament by law in this behalf, pay to the Council by way of grants such sums of money as the Central Government may consider necessary for the performance of the functions of the Council under this Act.

Fund of the Council

18. (1) The Council shall have its own fund; and the fees collected by it, all such sums as may, from time to time, be paid to it by the Central Government and all grants and advances made to it by any other authority or person shall be credited to the Fund and all payments by the Council shall be made therefrom.

(2) All moneys belonging to the Fund shall be deposited in such banks or invested in such manner as may, subject to the approval of the Central Government, be decided by the Council.

(3) The Council may spend such sums as it thinks fit for performing its functions under this Act, and such sums shall be treated as expenditure payable out of the Fund of the Council.

Budget

19. The Council shall prepare, in such form and at such time each year as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipt and expenditure, and copies thereof shall be forwarded to the Central Government.

Annual Report

20. The Council shall prepare once every year, in such form and at such time as may be prescribed, an annual report, giving a summary of its activities during the previous year, and giving an account of the standards of newspapers and news agencies and factors affecting them, and copies thereof, together with the statement of accounts audited in the manner, prescribed under section 22, shall be forwarded to the Central Government and the Government shall cause the same to be laid before both Houses of Parliament.

Interim reports

21. Without prejudice to the provisions of section 20, the Council may prepare at any time during the course of a year, a report giving a summary of such of its activities during the year as it considers to be of public importance and copies thereof shall be forwarded to the Central Government and the Government cause the same to be laid before both Houses of Parliament.

Accounts and audit

22. The accounts of the Council shall be maintained and audited in such manner as may, in consultation with the Comptroller and Auditor-General of India, be prescribed.

CHAPTER IV

Miscellaneous

Protection of action taken in good faith

23.(1) No suit or other legal proceedings shall lie against the Council or any member thereof or any person acting under the direction of the Council in respect of anything which is in good faith done or intended to be done under this Act.

(2) No suit or other legal proceeding shall lie against any newspaper in respect of the publication of any matter therein under the authority of the Council.

Members, etc., to be public servants: 45 of 1860

24. Every member of the Council and every officer or other employee appointed by the Council shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Power to make rules

25. (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

Provided that when the Council has been established no such rules shall be made without consulting the Council

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- (a) the procedure for nomination of members of the Council under clauses (a), (b) and (c) of sub-section (3) of section 5;
- (b) the manner in which panels of names may be invited under sub-section (4) of section 5;
- (c) the procedure for election of a member of the Committee referred to in sub-section (2) of section 5 under sub-section 6 of that section.
- (d) the allowances or fees to be paid to the members of the Council for attending the meeting of the Council, and other conditions of service of such members under sub-sections (1) and (2) of section 7.
- (e) the appointment of the Secretary and other employees of the Council under section 11;
- (f) the matters referred to in clause (f) of sub-section (1) of Section 15;
- (g) the rates at which fees may be levied by the Council under section 16 and the manner in which such fees may be levied;
- (h) the form in which and the time within which, the budget and annual report are to be prepared by the Council under sections 19 and 20 respectively;
- (i) the manner in which the accounts of the Council are to be maintained and audited under section 22.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be

without prejudice to the validity of anything previously done under that rule.

Power to make regulations

26. The Council may make regulations not inconsistent with this Act and the Rules made thereunder, for-

- (a) regulating the meetings of the Council or any committee thereof and the procedure for conducting the business thereat under section 9;
- (b) specifying the terms and conditions of service of the employees, appointed by the Council, under sub-section (2) of section 11;
- (c) regulating the manner of holding any inquiry under this Act;
- (d) delegating to the Chairman or the Secretary of the Council, subject to such conditions as it may think fit to impose, any of the powers under sub-section (3) of section 18;
- (e) any other matter for which provision may be made by regulations under this Act.

Provided that the regulations made under clause (b) shall be made only with the prior approval of the Central Government.

Amendment of Act 25 of 1867

27. In sub-section (1) of section 8C of the Press and Registration of Books Act, 1867, for the words "consisting of a Chairman and another member to be appointed by the Central Government", the words and figures "consisting of a Chairman and another member to be nominated by the Press Council of India, established under section 4 of the Press Council Act, 1978, from among its members" shall be substituted.

APPENDIX B

PRINCIPLES FOR CODE OF JOURNALISTIC ETHICS

The first Press Commission wanted that the following principles should find place in a code of journalistic ethics:

- (1) As the Press is a primary instrument in the creation of public opinion, journalists should regard their calling as a trust and be ready and willing to serve and guard the public interest.
- (2) In the discharge of their duties journalists shall attach due value to fundamental human and social rights and shall hold good faith and fair play in news reports and comments as essential professional obligations.
- (3) Freedom in the honest collection and publication of news and facts and the right of fair comment and criticism are principles which every journalist should always defend.
- (4) Journalists shall observe due restraint in reports and comments which are likely to aggravate tensions likely to lead to violence.
- (5) Journalists shall endeavour to ensure that information disseminated is factually accurate. No fact shall be distorted and no essential fact shall be suppressed. No information known to be false or not believed to be true shall be published.
- (6) Responsibility shall be assumed for all information and comment published. If responsibility is disclaimed, this shall be explicitly stated beforehand.
- (7) Unconfirmed news shall be identified and treated as such.
- (8) Confidence shall always be respected and professional secrecy preserved, but it shall not be regarded as a breach of the code if the source of information is disclosed in matters coming up before the Press Council

or courts of law.

- (9) Journalists shall not allow personal interests to influence professional conduct.
- (10) Any report found to be inaccurate and any comment based on inaccurate reports shall be voluntarily rectified. It shall be obligatory to give fair publicity to a correction or contradiction when a report published is false or inaccurate in material particulars.
- (11) All persons engaged in the gathering, transmission and dissemination of news and commenting thereon shall seek to maintain full public confidence in the integrity and dignity of their profession. They shall assign and accept only such tasks as are compatible with this integrity and dignity; and they shall guard against exploitation of their status.
- (12) There is nothing so unworthy as the acceptance or demand of a bribe or inducement for the exercise by a journalist of his power to give or deny publicity to news or comment.
- (13) The carrying on of personal controversies in the Press, where no public issue is involved, is unjournalistic and derogatory to the dignity of the profession.
- (14) It is unprofessional to give currency in the Press to rumours or gossip affecting the private life of individuals. Even verifiable news affecting individuals shall not be published unless public interests demand its publication.
- (15) Calumny and unfounded accusations are serious professional offences.
- (16) Plagiarism is also a serious professional offence.
- (17) In obtaining news or pictures reporters and press photographers shall do nothing that will cause pain or humiliation to innocent, bereaved or otherwise distressed persons.

APPENDIX C

AGRA DECLARATION OF JOURNALISTS¹

We, the working journalists of India, considering our calling as trust, believing in serving the public interest by publishing news and comments in free and fair manner, holding that the freedom of the Press and the right to information are inalienable and are inherent to the democratic process and as such need to be cherished and strengthened by all, realising that the Press and the society can flourish fully only when every individual freely enjoys his fundamental human rights and therefore, we must uphold and defend these rights, recognising that the rights of journalist, also enjoin upon them the obligation and duty to maintain the highest standards of personal and professional integrity and dignity; and feeling that in order not only to eschew fear or favour but also appear to be doing so, journalists must be ensured a reasonably decent living and appropriate working conditions; pledge and declare that-

1. We shall protect and defend at all costs the right to collect and publish facts and to make fair comment and criticism.

2. We shall endeavour to report and interpret the news with scrupulous honesty, shall not suppress essential facts. We shall observe and protect the rule of fair play to all concerned resisting all pressures.

3. We shall not acquiesce in or justify the imposition of censorship by any authority in any form and we shall not ourselves try to exercise censorship on others.

4. We shall endeavour to uphold and defend the fundamental human rights of the people and safeguard the public interest.

5. We shall not let ourselves be exploited by others, nor shall we exploit our status for personal ends. Personal matters shall not be allowed to influence professional conduct. We shall seek to maintain full public confidence in the integrity and dignity of the profession of journalism and shall ask and accept only such tasks which are compatible with its integrity and dignity.

6. We shall not deliberately invade personal rights and feelings of individuals without sure warrant of public interest as distinguished from public curiosity. But, we shall not

¹The declaration of journalists adopted by the National Union of Journalists (India) at its fourth biennial conference held at Agra on 6 and 7 February 1981.

compromise our rights to report and expose in public interest the affairs of public men and other influential people. For public affairs must be conducted publicly.

7. We shall consider the acceptance or demand of a bribe or inducement for publication or suppression of news as one of the most serious professional offences.

8. We shall unitedly and individually resist assaults and pressures from any quarters and in any form on journalists in particular and the Press in general in the discharge of professional work.

9. We shall always respect confidence and preserve professional secrecy.

10. We shall strive constantly to raise professional standard and improve the quality of work.

11. We shall try to exercise self-restraint and discretion in dealing with incidents of communal frenzy and other social tensions without prejudice to the people's right to know.

12. We shall collectively endeavour to secure higher levels of wages and better working conditions consistent with our functions, responsibilities and status. We shall not injure the economic or professional interest of fellow journalists by unfair means.

APPENDIX D

RECOMMENDATIONS OF THE PRESS COUNCIL OF INDIA ON PARLIAMENTARY PRIVILEGES AND THE FREEDOM OF THE PRESS¹

1. The legislature should not expand its existing privileges, which, in fact, are required to be minimised. Even in England the House of Commons cannot claim any new privileges other than those already claimed and accepted by the British courts as such.

2. The right of the press to be present in the legislature as in the court and to report its proceedings should be expressly recognised.

3. The Council agrees with the views expressed by the Select Committee appointed by the House of Commons in 1966 that the law of parliamentary privileges should not be administered in a way which would fetter or discourage the free expression of opinion or criticism however prejudiced or exaggerated such opinion or criticism might be.

4. The penal jurisdiction of the House should be exercised as sparingly as possible and only when the House is satisfied that to exercise it is essential to provide reasonable protection for the House, its members and its officers, from such improper obstruction as may cause interference with the performance of their respective functions.

5. Where a member has a remedy in courts he should not be permitted to invoke the penal jurisdiction of the House in lieu of or in addition to that remedy.

6. The penal jurisdiction should never be exercised in respect of complaints which appear to be of trivial character or unworthy of the attention of the House. Such complaints should be summarily dismissed.

7. In general, the power to commit for contempt should not be used as a deterrent against a person exercising a legal right, whether well-founded or not, to bring legal proceedings against a member or an officer.

8. It should be open to the House in deciding

¹Finalised at its meeting of 28 December 1982.

whether or not a contempt has been committed to take into account the honest and reasonable pleas in the truth of the allegations made, provided that they have been made only after all investigations had taken place, had been made in the honest and reasonable belief that it was in the public interest to make them, and had been published in a manner reasonably appropriate to that public interest. If the person against whom the complaint had been made is able to satisfy the House of all these matters, he cannot be said to have improperly obstructed or attempted improperly to obstruct the House and ought accordingly to be acquitted of contempt.

9. The following conduct should not itself be regarded a contempt of the House:

- (i) To publish, in advance of the publication of the relevant papers;
 - (a) how any member in fact voted in a division;
 - (b) the content of any motion which has in fact been tabled in Parliament;
- (ii) To publish the express intention of a member to vote in a particular manner (or abstain from voting).

10. The House should enjoy the power to remit, suspend or vary any penalty which it has imposed, upon receiving adequate undertaking from the person found guilty of contempt or for other good cause.

11. The legislature should take a liberal view of the press publishing expunged proceedings as no satisfactory mode exists to indicate to press reporters that certain proceedings have been expunged. In such a situation the reporter may commit a genuine mistake which should be condoned.

12. The presiding officer should not order wholesale non-recording of the proceedings as in a parliamentary democracy, the citizen has the right to be informed of the views and conduct of his representatives in the legislature.

13. A limitation of one year should be prescribed for taking cognizance of publication of offending material in the newspaper on the ground of breach of privilege.

14. Necessary provisions should be made in the Rules of Business and Conduct of Proceedings in the House to provide for a reasonable opportunity to alleged

contemners to defend themselves in the proceedings for the breach of privilege.

15. The person against whom a complaint of the breach of the privilege has been made should be entitled as a matter of right to attend the proceedings of the Privileges Committee, to be represented by a lawyer, to call witnesses, and to be provided legal aid, if necessary.

16. The Privileges Committee should be entitled to permit the calling of any witness by the person against whom the complaint of breach of privilege is made including the rights of examination, cross-examination and re-examination of witnesses.

17. There should be access to documents or evidence presented before a parliamentary committee after laying its report before the legislature, unless the court determines that it will be in the public interest not to do so.

18. It will inspire greater confidence among all the citizens if the legislature co-operates with the judiciary in a matter of any alleged breach of privilege challenged before the courts of law.

19. The Council reiterates its view that the privileges of Parliament and State legislatures should be codified in the interest of the freedom of the press. The Second Press Commission has also found it essential.

20. The Council suggests that the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha may set up a joint parliamentary committee for the codification of the privileges of Parliament. The press should be associated in this exercise in the manner in which the committee may think fit.

21. Meanwhile, it will be advisable to publish an official digest, under suitable headings, of the privileges cases which have taken place in the various legislatures during the last 30 years.

ANNEXURE E

RECOMMENDATIONS OF THE PRESS COUNCIL FOR
AMENDING THE CONTEMPT OF COURTS ACT

The Press Council widely circulated amongst the associations of journalists its study - Contempt of Court and the Press in India, prepared by the Law Institute of India. The view contained in the study and also the views received by the Council from the journalists were examined by the Council at its various meetings. The final recommendations of the Council as emerging therefrom have been drafted in the form of draft amendments of sections 2, 5 and 12. The Council recommends the following amendments to the Contempt of Courts Act, 1971:

A definition clause under section 2 (cc) may be added reading:

Nothing is done in good faith unless it is done with due care and caution.

A new proviso in section 5 is necessary. It should read:

Section 5(a) publication of any statement which is true or which the maker in good faith believes to be true shall not constitute criminal contempt provided the making of the statement is not accompanied by publicity which is excessive in the circumstances of the case.

A proviso may be added to section 12 reading:

Provided that if the contemnor pleads truth or bona fide belief in truth as a defence and the court finds that the defence is false the contemnor shall be punished with rigorous imprisonment for a period of six months and fine or both.

Additional suggestions

Clause (b) should be added in section 5 or a separate section 5A be inserted as follows:

The discussion of affairs or other matters of general public interest in good faith will not constitute contempt of court if the prejudice to particular legal proceedings is merely incidental to the discussion.

The following section should be inserted at an appropriate place:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

APPENDIX F

RECOMMENDATIONS FOR AMENDING S. 5
OF THE OFFICIAL SECRETS ACT

The Press Council widely circulated amongst the associations of journalists the study - Official Secrecy and the Press, prepared by the Indian Law Institute. The views contained in the study and also the views received by the Council from the journalists were examined by the Council at its various meetings. The final recommendations of the Council as emerging therefrom have been drafted in the form of draft amendment of section 5. The Council recommends that the present section 5 of the Official Secrets Act may be replaced by the following:

S. 5 Wrongful communication, etc., of information.-

(1) If any person having an "official secret" in his possession in whatever manner obtained, whether by virtue of holding or having held official position, or by virtue of a contract with the government, or receiving the information in confidence from a person holding office in the government-

- (a) communicates to any person or uses the "official secret"; or
- (b) fails to take reasonable care of, or so conducts himself as to endanger the safety of the "official secret"; or
- (c) wilfully fails to return the "official secret" when it is his duty to return it;

he shall be guilty of an offence under this section.

(2) Nothing shall be an offence under the section if it predominantly and substantially subserves public interest, unless the communication or use of the "official secret" is made for the benefit of any foreign power or in any manner prejudicial to the safety of the State.

(3) Any person voluntarily receiving any "official secret" knowing or having reasonable ground to believe at the time when he receives the "official secret" that it is communicated in contravention of this Act shall be guilty of an offence under this section.

(4) For the purposes of this section "official secret" means-

Any secret code, password, any sketch, plan, model, article, note, document, including documents regarding proceedings, decisions, minutes of the Union or State Cabinet, or information, which relates to or is used in a prohibited place or relates to anything in such a place, or which relates to any government department;

Provided it is of the nature concerning-

- (a) Defence or security of the nation;
- (b) Foreign relations'
- (c) Monetary policy, foreign exchange policy, economic plans and policies, commercial or financial information, where premature disclosure may harm the national interest or provide opportunities for unfair financial gains to private interests;
- (d) Information which is (i) likely to be helpful in the commission of offences; (ii) likely to be helpful in facilitating an escape from legal custody or to be prejudicial to prison security; or (iii) likely to impede the prevention or detection of offences or the apprehension or prosecution of offenders;
- (e) Private information given to the government in confidence;
- (f) Trade secrets.

(5) No person shall be prosecuted under this section without the sanction of a committee consisting of the Attorney-General of India, a person nominated by the Chairman of the Press Council of India and a person nominated by the Chairman of the Bar Council of India, unless the charge against the person is that he communicated or used the "official secret" for the benefit of a foreign power or in a manner prejudicial to the safety of the State.

(6) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

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Note:

Ann. Rep. : Annual Report of the Press Council.

c.a. : complaint against.

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